

No. 92-757-CFX

Title: Barbara Landgraf, Petitioner
v.
USI Film Products, et al.

Docketed:
October 28, 1992

Court: United States Court of Appeals for
the Fifth Circuit

Vide:
92-938

Entry Date

Proceedings and Orders

Oct 28 1992	Petition for writ of certiorari filed.
Nov 23 1992	Waiver of right of respondents USI Film Products, et al. to respond filed.
Nov 24 1992	DISTRIBUTED. December 11, 1992
Nov 30 1992	Response requested. (Due December 30, 1992)
Dec 30 1992	Brief of respondents USI Film Products, et al. in opposition filed.
Jan 6 1993	REDISTRIBUTED. February 19, 1993
Jan 13 1993	REDISTRIBUTED. February 19, 1993
Feb 11 1993	Supplemental brief of petitioner Barbara Landgraf filed.
Feb 22 1993	Petition GRANTED. limited to Question 1 presented by the petition. The case is consolidated with No. 92-938, Rivers v. Roadway Express, Inc., and a total of one hour is allotted for oral argument. *****
Mar 5 1993	Record filed.
Mar 23 1993	Order extending time to file brief of petitioner on the merits until April 30, 1993.
Apr 30 1993	Brief amici curiae of National Women's Law Center, et al. filed.
Apr 30 1993	Brief amici curiae of NAACP, et al. filed.
Apr 30 1993	Brief amici curiae of United States, et al. filed. VIDED.
Apr 30 1993	Brief of petitioner Barbara Landgraf filed.
Apr 30 1993	Joint appendix filed.
Apr 30 1993	Brief amici curiae of Asian American Legal Defense and Education Fund, et al. filed. VIDED.
May 12 1993	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
May 14 1993	Motion of respondents for divided argument filed.
May 17 1993	Record filed.
May 24 1993	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
May 24 1993	Motion of respondents for divided argument DENIED.
May 28 1993	Order extending time to file brief of respondent on the merits until June 25, 1993.
Jun 3 1993	Brief amicus curiae of Midwest Motor Express, Inc. filed. VIDED.
Jun 25 1993	Brief of respondents USI Film Products, et al. filed.
Jun 25 1993	Brief amici curiae of American Trucking Associations, et al. filed. VIDED.
Jun 25 1993	Brief amici curiae of Equal Employment Advisory Council, et

Entry Date

Proceedings and Orders

	al. filed. VIDED.
Jun 25 1993	Brief amicus curiae of Wards Cove Packing Co. filed. VIDED.
Jul 21 1993	Application (A93-76) extension of time to file reply brief, submitted to Justice Scalia.
Jul 23 1993	Application (A93-76) granted by Justice Scalia extending the time to file until August 10, 1993.
Aug 10 1993	CIRCULATED.
Aug 10 1993	Reply brief of petitioner filed.
Aug 16 1993	SET FOR ARGUMENT WEDNESDAY, OCTOBER 13, 1993.(1ST CASE).
Oct 13 1993	Revised Rule 29.1 statement filed by respondent.
Oct 13 1993	ARGUED,

92-757

No. 92-

Supreme Court, U.S.

FILED

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OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
October Term 1992

BARBARA LANDGRAF,

Petitioner,

v.

USI FILM PRODUCTS,
BONAR PACKAGING, INC., AND
QUANTUM CHEMICAL CORPORATION,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT**

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QUESTIONS PRESENTED

- I. Does the Civil Rights Act of 1991 apply to cases pending when the Act became law so as to entitle petitioner to the full redress provided in section 102 of the Act, where both lower courts found that she was the victim of unlawful sexual harassment in violation of Title VII, but was not entitled to any relief whatsoever?
- II. Did the Fifth Circuit misapply the "manifest injustice" test set forth in *Bradley v. School Board of Richmond*, 416 U.S. 696 (1974), in determining that the application of the Civil Rights Act of 1991 to this case would result in manifest injustice to respondents?

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BARBARA LANDGRAF,

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USI FILM PRODUCTS,
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Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT**

Petitioner Barbara Landgraf respectfully prays that the Supreme Court grant a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on July 30, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported as *Barbara Landgraf v. USI Film Products, Bonar Packaging, Inc., and Quantum Chemical Corporation*, 968 F.2d 427 (5th Cir. 1992). (App. A-1) The district court issued Findings of Fact and Conclusions of Law on May 20, 1991. Those Findings and Conclusions are not reported, but are set forth in the Appendix at B-1. The district court's judgment was entered on May 22, 1991. (App. C-1)

JURISDICTION

The judgment of the Court of Appeals was entered on July 30, 1992.

This Court has jurisdiction to hear this case pursuant to 28 U.S.C. §§ 1254(1) and 2101(c).

STATUTE INVOLVED

This case involves the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991). The specific provision at issue in this case is section 102 of the Act. The Act is set forth in its entirety in the Appendix at D-1.

STATEMENT OF THE CASE

Barbara Landgraf was employed by USI Film Products ("USI")¹ from September 4, 1984 through January 17, 1986. During that period, she was subjected to sexual harassment consisting of continuous and repeated inappropriate verbal comments and physical contact by a fellow employee, John Williams. Several times, Ms. Landgraf reported that harassment to her direct supervisor, Bobby Martin, but to no avail; Martin took no action to stop the harassment. She eventually reported the harassment to Sam Forsgard, supervisor of personnel matters. Forsgard conducted an investigation that entailed interviewing numerous female employees of USI. Those women corroborated Ms. Landgraf's allegations. As a result of that investigation, USI purportedly transferred Williams to another department in the plant; Williams also received a written reprimand. USI conceded, however, that Williams was still in Ms. Landgraf's work area on a regular basis. (App. A-3) Shortly after Williams was "transferred," Ms. Landgraf resigned from her position at USI.

¹ USI Chemical Products, which is not a legal entity, is the plant where Barbara Landgraf worked. USI was owned by Quantum Chemical Corporation while Barbara Landgraf worked there. It is now owned by Bonar Packaging, Inc. Prior to trial the parties stipulated that Bonar Packaging, Inc. is the corporate successor in interest.

Ms. Landgraf filed a timely charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). In due course, the EEOC issued a Notice of Right to Sue.

On July 21, 1989, Ms. Landgraf commenced a timely action against USI in the United States District Court for the Eastern District of Texas alleging, among other things, sexual harassment under Title VII of the Civil Rights Act of 1964. A bench trial was held on February 4, 1991. On May 22, 1991, the district court entered Findings of Fact and Conclusions of Law. The district court found *inter alia* that:

- Ms. Landgraf had been subjected to continuous sexual harassment consisting of "continuous and repeated inappropriate verbal comments and physical contact" from John Williams;
 - Ms. Landgraf's direct supervisor, Bobby Martin, had taken no action to halt the harassment, even though Ms. Landgraf reported the harassment on several occasions;
 - The remedial actions that were eventually instituted after Sam Forsgard's investigation alleviated the harassment;
 - Ms. Landgraf resigned because she had difficulty getting along with her co-workers, and that that situation was unrelated to the sexual harassment; and
 - Ms. Landgraf "suffered mental anguish as a result of the sexual harassment she was subjected to while working at USI".
(App. B-1-B-2)
- In light of the above, the district court concluded that:
- Ms. Landgraf was the victim of unlawful sexual harassment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(c) *et seq.*;
 - Ms. Landgraf's complaints to Martin constituted actual notice of the harassment;

- Martin's repeated failure to take action, constituted failure on the part of USI to take prompt remedial action to halt the sexual harassment;

- Ms. Landgraf was not constructively discharged within the meaning of *Bourque v. Powell Electrical Manufacturing Co.*, 617 F.2d 61, 65 (5th Cir. 1980); and

- Ms. Landgraf was entitled to no relief whatsoever.

(App. B-2-B-5)

The district court's judgment was entered on May 22, 1991. (App. C-1) Barbara Landgraf timely appealed from that judgment, asserting that the district court erred in finding that USI had taken steps reasonably calculated to end the harassment, and that she had not been constructively discharged. Ms. Landgraf also asserted that the district court erred in failing to make findings of fact and conclusions of law relating to her retaliation claim. In addition, she argued that even if she failed to prove constructive discharge, she still was entitled to nominal damages and equitable relief. Finally, Ms. Landgraf asserted that the compensatory and punitive damages and the jury trial provisions of the Civil Rights Act of 1991 (the "Act") were applicable to her case.²

On July 30, 1992, the Court of Appeals for the Fifth Circuit, which had jurisdiction pursuant to 28 U.S.C. § 1291, affirmed the district court's ruling. (App. A-10) Citing its limited scope of review, the court held that the district court did not clearly err in making its findings and conclusions. (App. A-4-A-6) The court likewise rejected Ms. Landgraf's arguments for nominal damages and equitable relief. (App. A-6-A-7)

² The Civil Rights Act of 1991 was signed into law on November 21, 1991, while Ms. Landgraf's appeal was pending. By letter dated February 6, 1992, counsel for petitioner requested the clerk of the court to bring to the Fifth Circuit's attention the potential applicability of the Act to her case.

Ms. Landgraf's argument with respect to the applicability of section 102 of the Civil Rights Act of 1991 also was rejected. (App. A-8-A-10) Referring to *Johnson v. Uncle Ben's Inc.*, 965 F.2d 1363 (5th Cir.1992), in which the Fifth Circuit recently had held that section 101 of the Act is not applicable to pending cases, the court held that section 102 of the Act likewise is not applicable to such cases. The court applied the "manifest injustice" test of *Bradley v. School Board of Richmond*, 416 U.S. 696 (1974), and determined first, that requiring respondents to retry the case before a jury would be an injustice and a waste of judicial resources, and second, that applying the compensatory and punitive damages provision would be an injustice because it would impose "an additional or unforeseeable obligation" on respondents. (App. A-9-A-10)

Thus, the Fifth Circuit held that although Barbara Landgraf was the victim of "uncontested . . . significant sexual harassment," she would be left with no remedy whatsoever, because neither the jury trial nor the compensatory and punitive damages sections of the Act could be applied to "conduct occurring before [the Act's] effective date". (App. A-10)

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT *CERTIORARI* TO RESOLVE THE SPLIT IN THE CIRCUITS AS TO WHETHER THE CIVIL RIGHTS ACT OF 1991 APPLIES TO PENDING CASES.

To date, the Fifth, Sixth, Seventh, Eighth, Ninth, Eleventh, and District of Columbia Circuits have ruled on the question of the Act's application to pending cases.³ Six of those circuits have held that the Act, or parts thereof, is not applicable to pending cases. The Ninth Circuit has held that it is. As such, there is conflicting jurisprudence on this issue. We respectfully submit

³ To date at least 263 district and circuit court cases have addressed the issue, often with extensive opinions. An index of those cases is attached at App. E-1.

that the issue has been sufficiently vetted by the lower courts and that it is now ripe for review in this Court. Without this Court's guidance, the lower courts will remain in hopeless conflict on this important issue.

A. This Court Should Grant *Certiorari* to Resolve the Conflicting Holdings of the Courts of Appeals.

Less than three months after the Fifth Circuit ruled in this case, the Ninth Circuit created a conflict in the circuits by holding that all provisions of the Civil Rights Act of 1991 apply to pending cases, except where the Act explicitly states otherwise. *Davis v. City of San Francisco*, No. 91-15113, 1992 U.S. App. LEXIS 24836 (9th Cir. Oct. 6, 1992). Next month marks the one-year anniversary of the Civil Rights Act of 1991. Since the passage of the Act, the issue whether the Act applies to pending cases has confronted virtually every federal court, and the courts are in hopeless disarray. An enormous quantity of judicial resources has been expended on this issue. Moreover, until this Court rules, members of the bench and bar will continue to expend such resources. Those expenditures, however, will be futile; only this Court can resolve the issue. We are aware that this issue has been presented to the Court on several occasions, but that the Court apparently decided to wait for a full airing in the lower courts. See *Gersman v. Group Health Ass'n, Inc.*, 931 F.2d 1565 (D.C. Cir. 1991), *cert. granted and judgment vacated* by 112 S. Ct. 960 (1992); *Holland v. First Virginia Banks, Inc.*, 937 F.2d 603 (4th Cir. 1991), *cert. granted and judgment vacated* by 112 S. Ct. 1152 (1992); *Hicks v. Brown Group, Inc.*, 946 F.2d 1344 (8th Cir. 1991), *cert. granted and judgment vacated* by 112 S. Ct. 1255 (1992). The Court also apparently waited to see whether a conflict in the circuits would develop. See *Moze v. American Commercial Marine Serv. Co.*, 963 F.2d 929 (7th Cir.), *cert. denied*, 61 U.S.L.W. 3150 (Oct. 5, 1992). The issue has been aired and a conflict does exist. Now, we submit, it is time for the Court to resolve this conflict.

Without further guidance from this Court, the lower courts cannot come to a consistent resolution of this issue. See *Baynes v. A.T. & T. Technologies, Inc.*, No. 91-8488, 1992 U.S. App. LEXIS

26892, at *1 n.1, *12 (11th Cir. Oct. 20, 1992) (holding that §§ 101, 102 do not apply to pending cases where a judgment had been entered prior to November 21, 1991, but declining to decide whether the Act would apply to pending cases "in other circumstances"); *Gersman v. Group Health Ass'n, Inc.*, No. 89-5482, 1992 WL 220163, *15-*16 (D.C. Cir. Sept. 15, 1992) (Sentelle, J.) (declining to apply § 101 of the Act, which affected substantive rights, to pre-enactment conduct, but leaving open the issue of whether "procedural" and "remedial" changes would apply to pending cases); *Luddington v. Indiana Bell Tel. Co.*, 966 F.2d 225, 229-30 (7th Cir. 1992) (holding that the Act did not apply to pre-enactment conduct "if the suit had been brought before the effective date", but not addressing suits based on pre-enactment conduct and filed after the effective date). Compare *Fray v. Omaha World Herald Co.*, 960 F.2d 1370, 1378 (8th Cir. 1992) (holding broadly that "§ 101 of the Act, overruling *Patterson*, should not be applied to pending cases or other pre-enactment conduct")⁴; *Vogel v. City of Cincinnati*, 959 F.2d 594, 597 (6th Cir.) ("We hold that the 1991 Act does not govern the instant case which involves conduct that occurred before the 1991 Act became law."), *cert. denied*, 60 U.S.L.W. 3881 (Oct. 5, 1992).

B. This Court Should Grant *Certiorari* Because the Important Issue Raised By This Case Has Been Thoroughly Examined by the Lower Courts and Urgently Requires Resolution.

The circuits disagree not only as to whether the Act in general should apply to pending cases, but also with respect to the legal bases for their decisions. See *Davis*, No. 91-15113, 1992 U.S. App. LEXIS 24836, at *41-*65 (criticizing other circuits' failure to analyze the plain language of the Act correctly; unlike those courts, finding no need to rely on judicial presumptions, given that plain language); see also *Tyler v. Commonwealth of Pa.*,

⁴ Following the Supreme Court's decision to remand the *Hicks* case, see *Hicks*, 112 S. Ct. at 1255, the Eighth Circuit is re-visiting the issue *en banc*. See *Hicks v. Brown Group, Inc.*, Nos. 88-2769/2817 EM (argued on July 21, 1992).

Dep't of Revenue, 793 F. Supp. 98, 98 (M.D. Pa. 1992) ("Although the three circuit courts [*Moze*, *Fray* and *Vogel*] which have had the opportunity to address this issue have all held that the Act has no retroactive effect, each court based its decision on a different rationale."). Until this Court rules, this confusion will persist.

The Eighth Circuit alone relied heavily on legislative history, finding that Congress's inability to override the President's veto of a prior version of the Act that explicitly applied to pending cases was "dispositive" of Congress's intent that the Act should apply only prospectively. *Fray*, 960 F.2d at 1378. However, the opposite inference can be drawn from the Act's omission of language proposed by the Administration that would have expressly provided for prospective application only. See *Davis*, No. 91-15113, 1992 U.S. App. LEXIS 24836, at *58-*60 (criticizing *Fray*'s interpretation of the legislative history). While five other circuits have declined to apply the Act, or parts thereof, to pending cases, they found little guidance in either the language of the Act or its legislative history. The Fifth, Seventh, Eleventh and District of Columbia Circuits chose to rely on different judicial rules for interpreting whether statutes apply to pending cases. See *Baynes*, No. 91-8488, 1992 U.S. App. LEXIS 26892, at *3-*6; *Landgraf*, 968 F.2d at 432; *Moze*, 963 F.2d at 934; *Gersman*, No. 89-5482, 1992 WL 220163, at *5, *7, *16.⁵ See also *Vogel*, 959 F.2d at 598.

⁵ In a majority of these decisions, dissenting judges have added to the analysis of the issues. See *Gersman*, No. 89-5482, 1992 WL 220163 (Wald, J., dissenting) (thoroughly reviewing other circuits' decisions and the rules of statutory construction, then finding no reason not to apply § 101, because the new law is the same as the law before *Patterson*, when the disputed conduct occurred); *Moze*, 963 F.2d at 940 (Cudahy, J., dissenting) ("The specific facts of the real-life case . . . cry out for a different solution. . . . [The majority's] result . . . is neither rational nor just."); *Fray*, 960 F.2d at 1380 (Heaney, St. J., dissenting) (taking issue with the majority's reliance on legislative history, because "Congress . . . deliberately left the Act retroactivity-neutral, reserving the issue for the courts to decide.").

The Ninth Circuit's analysis focused on what this Court has repeatedly declared to be the "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative". *Davis*, No. 91-15113, 1992 U.S. App. LEXIS 24836, at *46 (quoting *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 510 n.22 (1986) (quoting *Colautti v. Franklin*, 439 U.S. 379, 392 (1979))). Just last term, this Court reiterated that rule: it is a "settled rule" of statutory construction "that a statute must, if possible, be construed in such fashion that every word has some operative effect". *United States v. Nordic Village, Inc.*, 112 S. Ct. 1011, 1015 (1992). Moreover, this Court has noted "time and again" that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there". *Connecticut Nat'l Bank v. Germain*, 112 S.Ct. 1146, 1149 (1992).

Applying this cardinal rule of statutory construction, the Ninth Circuit held that because the statute directs that "in two specific instances the Act not be applied to cases having to do with pre-Act conduct", the rest of the Act must apply to pending cases; otherwise, those provisions would be mere surplusage. See *Davis*, No. 91-15113, 1992 U.S. App. LEXIS 24836, at *14-*15. "Guided by the plain language of the statute and [the aforementioned] cardinal rule of interpretation", the Ninth Circuit concluded that "Congress intended the courts to apply the Civil Rights Act of 1991 to cases pending at the time of its enactment and to pre-Act conduct still open to challenge after that time". *Davis*, No. 91-15113, 1992 U.S. App. LEXIS 24836, at *65. The Fifth, Sixth, Seventh, Eighth, Eleventh and D.C. Circuits, however, barely acknowledge that tenet of statutory interpretation. See *id.* at *50-*54.

Until this Court rules, uncertainty will continue to hang over all the civil rights cases that were pending when the act was passed, as well as those cases filed after its enactment that are based on pre-Act conduct. To minimize the number of cases that

must be reversed and possibly retried⁶—to avoid needless waste of judicial resources—we submit that immediate resolution of this issue is required. Accordingly, petitioners urge the Court to grant a writ of *certiorari*.

C. This Court Should Grant *Certiorari* to Afford Redress to Victims of Illegal Discrimination.

In passing the Civil Rights Act of 1991, Congress found that “additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace”. 105 Stat. 1071 § 2(1). As Senator Jeffords commented on the Senate floor, “[f]or the first time ever, this bill will provide substantial damages for those women who do successfully prove intentional discrimination to the courts”. 137 Cong. Rec. S15242 (daily ed. Oct. 25, 1991). It is undisputed that Barbara Landgraf “suffered significant sexual harassment” during her employment at USI. (App. A-3) As a result of that harassment, she suffered mental anguish. (App. B-2) Clearly, Ms. Landgraf is the type of plaintiff Congress had in mind when amending Title VII to afford victims of sexual harassment and sex discrimination remedies commensurate with those available under section 1981 to victims of racial discrimination. As Senator Durenberger stressed, the Act “closes [a] gigantic loophole in our discrimination laws”. 137 Cong. Rec. S15490 (daily ed. Oct. 30, 1991); see also 137 Cong. Rec. S15446 (daily ed. Oct. 30, 1991) (“The current hierarchy of remedies simply makes no sense. Under existing law, a black woman can sue for damages for racial discrimination but if she suffers gender discrimination, she’s out of luck.”). However, despite Congress’s clear intent to provide

⁶ As an indication of the uncertainty the district courts face, some courts have gone so far as to conduct simultaneously a bench and a jury trial, sealing the bench trial opinions until the jury’s decision was announced. The judge in *Boss v. Board of Educ., Union Free School District #6*, No. CV 92-0399, 1992 WL 160398 (E.D.N.Y. July 6, 1992) instituted this procedure to obviate the need to remand the case for a new trial if the circuit court or Supreme Court applies the § 102 remedies to the case. The judge in *Hendricks v. Clark*, 57 Fair Empl. Prac. Cas. (BNA) 1328 (N.D. Ala. Jan. 14, 1992) adopted a similar procedure, again to avoid the need for a retrial.

victims like Ms. Landgraf with legal redress, the Fifth Circuit held that she “was not entitled to *any relief* under Title VII”. (App. A-6-A-10 (emphasis added)) Such a holding conflicts with this Court’s recent pronouncement in an analogous context that “absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute”. *Franklin v. Gwinnett County Pub. Sch.*, 112 S. Ct. 1028, 1035 (1992) (where a female former-student had been subjected to sexual harassment and otherwise would be afforded no relief, the Court held there is an implied right of action for damages under Title IX). Here, even though both lower courts found that Ms. Landgraf was the victim of unlawful sexual harassment, she was denied any relief whatsoever. This Court should grant the writ of *certiorari* to reverse this injustice.

II. THIS COURT SHOULD GRANT *CERTIORARI* TO RESOLVE THE CONFLICT CONCERNING THE APPLICATION OF JUDICIAL PRESUMPTIONS.

Courts need not apply judicial presumptions when the plain language of a statute is clear. The Fifth Circuit, however, ignored that well-established principle of statutory construction and relied on judicial presumptions to reach its holding. Even if reliance on judicial presumptions were appropriate here—and, we submit, it is not—the Fifth Circuit misapplied the presumption in this case.

In *Bradley v. School Board of Richmond*, 416 U.S. 696 (1974), a unanimous Supreme Court announced a presumption in favor of applying new statutes to pending cases. Relying on Chief Justice Marshall’s opinion in *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), the Court stated that, “a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary”. *Bradley*, 416 U.S. at 711. Later, in a case involving the Secretary of Health and Human Services’ authority to promulgate retroactive cost limits by regulation, the Court stated in dicta: “Retroactivity is not favored in the law. Thus, congressional enactments and

administrative rules will not be construed to have retroactive effect unless their language requires this result." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).⁷

The Court since has described these lines of authority as existing in "apparent tension". *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990). That "apparent tension" runs through the opinions of many courts that have attempted to decide whether the 1991 Act applies to pending cases. Indeed, that "apparent tension" has generated much of the confusion surrounding the issue. Recognizing the "tension between the *Bradley* and *Bowen* cases" the Fifth Circuit correctly chose to apply the *Bradley* "manifest injustice" test (App. A-9), but, we submit, misapplied it.

Notwithstanding the "apparent tension" and the lower courts' continued difficulty in applying those judicial presumptions, it is important to note that the tension between *Bradley* and *Bowen* is more apparent than real. In *Bowen*, the Court refused to alter vested rights through retroactive rulemaking, and *Bradley* unequivocally agreed that "[t]he Court has refused to apply an intervening change to a pending action where it had concluded to do so would infringe upon or deprive a person of a right that had matured or become unconditional". *Bradley*, 416 U.S. at 720 (citations omitted). In this regard, the holding and result of *Bowen* fits squarely within the principle of *Bradley*. See *Federal Deposit Ins. Corp. v. Wright*, 942 F.2d 1089, 1095 n.6 (7th Cir. 1991) ("Any tension between the two lines of precedent is negated because, under *Bradley*, a statute will not be deemed to apply retroactively if it would threaten manifest injustice by disrupting vested rights."), *cert. denied*, 112 S. Ct. 1937 (1992).

The remedial right to damages and the procedural right to a jury trial at stake in this case do not alter vested rights, and thus fall outside the *Bowen* rule. See, e.g., *Bridges v. Eastman Kodak Co.*, No. 91 Civ. 7985 (RLC), 1992 WL 213260, at *5 (S.D.N.Y.

⁷ In *Bowen*, the issue of retroactive application was not part of the holding since the Court held that "the Secretary has no authority to promulgate retroactive cost-limit rules". *Bowen*, 488 U.S. at 215.

Sept. 1, 1992) (finding no "manifest injustice" in applying § 102 of the Act to pre-enactment conduct, because the parties had "no 'vested right []', 'to limit their damages or to a trial by jury before the [1991 Civil Rights] Act took effect'" (citation omitted); *Manning v. Moore Business Forms, Inc.*, No. 91-C-707-S, 1992 WL 160604, at *2 (W.D. Wis. Mar. 31, 1992) (in holding that § 102 of the Act applies to pending cases, the court reasoned that "there is no vested right in a court trial or a damage limitation").⁸

In applying the *Bradley* test, the crux of the Fifth Circuit's reasoning was that "to charge individual employers with anticipating [the] change in damages available under Title VII" would be an "injustice". *Id.* As such, the court found that justice is more concerned with preserving employers' calculations of the costs of committing intentional illegal acts than with recompensing victims of "uncontested" illegality (the sexual harassment of Ms. Landgraf was "uncontested" (App. A-3)).

The Fifth Circuit's reasoning cannot be right. The law absolutely prohibits—and has absolutely prohibited since Title VII became law in 1964—intentional discrimination. "The law has never countenanced that an employer may weigh the legal consequences of his discrimination and choose to continue his unlawful conduct. An employer cannot pay for the right to discriminate because no such 'right' has ever existed . . . [T]he law has always permitted a Court to impose unconditional injunctive relief." *Robinson v. Davis Memorial Goodwill Indus.*,

⁸ A review of the last five Supreme Court cases, including *Bradley* and *Bowen*, involving the application of new law to pending cases, or prior conduct, demonstrates that *Bradley* and *Bowen* represent two distinct kinds of cases. See *Bowen*, 488 U.S. 204 (1988); *Bennett v. New Jersey*, 470 U.S. 632 (1985); *United States v. Security Indus. Bank*, 459 U.S. 70 (1982); *Bradley*, 416 U.S. 696 (1974); *Thorpe v. Housing Auth.*, 393 U.S. 268 (1969). Where a change in law does not alter vested rights, it will be presumed to apply to pending cases. Conversely, where a change in law alters vested rights, or changes the legal effects of past acts, the change will be presumed to apply prospectively. See, e.g., *Lussier v. Dugger*, 904 F.2d 661, 665-66 (11th Cir. 1990) (noting statutory changes that affect procedural and remedial matters presumably apply to pending cases; distinguishing changes that affect substantive matters).

790 F. Supp. 325, 332 (D.D.C. 1992).⁹ In addition, "[t]here is little precedent for, and certainly little logic in, construing the retroactivity of the [Civil Rights Act of 1991] to favor the wrongdoers and deny their victims the right to recover fair damages." *Tarver v. Functional Living, Inc.*, 796 F. Supp. 246 (W.D. Tex. 1992) (citations omitted). "Because society's valuation of a victim's losses understandably changes over time, it does not seem unfair to force litigating parties to comply with the more recent statutory changes with regard to damages." *Moze*, 963 F.2d at 939; see *Bridges*, No. 91 Civ. 7985 (RLC), 1992 WL 213260, at *5 (same). By analogy, the 1972 amendment that provided new remedies in cases of federal employment discrimination was widely held to apply to pending cases. See, e.g., *Womack v. Lynn*, 504 F.2d 267, 269 (D.C. Cir. 1974) (applying the amendment to pending cases because it "is merely a procedural statute that affects the remedies available to federal employees suffering from employment discrimination. Their right to be free of such discrimination has been assured for years") (emphasis in original).

Similarly, the jury trial to which Ms. Landgraf would have been entitled had the Fifth Circuit applied the Act to her case, as we submit the Act intends, is a procedural matter and does not affect the merits of the underlying conduct. See *Lorillard v. Pons*, 434 U.S. 575, 584 (1978) (examining procedural provisions of federal statutes to discern jury trial right); *Wabot v. Villacrusis*, 958 F.2d 1450, 1460 (9th Cir. 1990) ("The jury trial guarantee is primarily a procedural right . . ."). Even district courts that do not find the entire Act applicable to pending cases find that the right to a jury trial should apply because it is a procedural right. See *Basilick v. Cole Taylor Bank*, No. 91-C-5156, 1992 WL 166950, at *1 (N.D. Ill. July 8, 1992) (applying jury trial right of the Civil Rights Act of 1991 to pending cases because "[t]here

⁹ See also *Moze*, 963 F.2d at 939 ("Granted, the greater an award of damages for proscribed, unwanted conduct, the less likely that persons and entities will perform this unwanted conduct. Nonetheless, the traditional theory underlying at least compensatory damages is that they are meant to compensate parties for their losses.").

can be no doubt that the jury right does not involve changes in substantial matured rights and obligations"); *Brown v. Amoco Oil Co.*, 793 F. Supp. 846, 851 (N.D. Ind. 1992) (considering the "right to a jury trial" to be a "procedural matter"); *Pandya v. City of Chicago*, No. 91 C 5700, 1992 U.S. Dist. LEXIS 12074, *19 (N.D. Ill. Aug. 11, 1992) ("The right to a jury trial is a procedural rule which can be applied retroactively."). But see *Baynes*, No. 91-8488, 1992 U.S. App. LEXIS 26892, at *10-*11 (holding it would be a manifest injustice to apply the Act's jury trial right to pending cases, because the Act as a whole changes substantive obligations as well as procedural rights). By analogy, in applying the jury trial right to pending cases under the 1978 amendments to the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.*, the Sixth Circuit held that a jury resolution of a plaintiff's claims poses no threat of injustice to either party. *Scarboro v. First Am. Nat'l Bank*, 619 F.2d 621, 622 (6th Cir.), *cert. denied*, 449 U.S. 1014 (1980).

In holding that the jury trial right does not apply to this case, the Fifth Circuit reasoned that to retry the case would be "an injustice and a waste of judicial resources." (App. A-9) The Fifth Circuit's concern with injustice was concern lest the "settled expectations of the parties" be disturbed. *Id.* But parties do not plan their actions by considering whether they will receive a jury trial should they run afoul of the law. Nor should the argument about judicial resources overcome the right to a procedure Congress has guaranteed by statute. The Fifth Circuit failed to overcome the reasoning of the other courts that have considered whether the Act's procedural rights should be applicable to pending cases.

Because the Fifth Circuit misapplied the *Bradley* test, denying Ms. Landgraf—whose Title VII rights unquestionably were violated—the relief and procedural protection to which she is entitled under the Act, petitioner urges the Court to issue a writ of *certiorari*.

CONCLUSION

For the reasons stated above, petitioner Barbara Landgraf requests this Court to issue a writ of *certiorari* to review the decision of the Court of Appeals for the Fifth Circuit.

October 28, 1992.

Respectfully submitted,

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APPENDIX A

**OPINION OF THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT**

JULY 30, 1992

A-1

No. 91-4485

UNITED STATES COURT OF APPEALS,
FOR THE FIFTH CIRCUIT

July 30, 1992

Barbara LANDGRAF,
Plaintiff-Appellant,

v.

USI FILM PRODUCTS, Bonar Packaging, Inc., and
Quantum Chemical Corporation,
Defendants-Appellees.

Timothy B. Garrigan, Stuckey & Garrigan, Nacogdoches,
Tex., for plaintiff-appellant.

Gregory D. Smith, Mike A. Hatchell, Ramey, Flock, Jeffus,
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Quantum.

Appeal from the United States District Court for the Eastern
District of Texas.

Before GOLDBERG, HIGGINBOTHAM, and DAVIS, Circuit
Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Barbara Landgraf brought suit against her employer asserting sexual harassment and retaliation claims under Title VII. After a bench trial, the district court entered judgment in favor of the defendants. Although the district court found that sexual harassment had occurred, it concluded that Landgraf had not been constructively discharged and therefore was not entitled to any relief under Title VII. Landgraf asserts on appeal that the district court clearly erred in finding that she was not constructively

discharged and that the district court erred in failing to make factual findings on her retaliation claim. She also argues that she is entitled to nominal damages even if she is unable to demonstrate a constructive discharge. Finally, she asserts that the damage and jury trial provisions of the Civil Rights Act of 1991 should be applied retroactively to her case. We affirm the district court's judgment in all respects and find that the Civil Rights Act of 1991 does not apply to this case.

I.

Landgraf worked for USI Film Products in its Tyler, Texas production plant on the 11:00 p.m. to 7:00 a.m. shift. From September 1984 to January 1986, she was employed as a materials handler operating a machine which produced several thousand plastic bags per shift. While she worked at the plant, fellow employee John Williams subjected her to what the district court described as "continuous and repeated inappropriate verbal comments and physical contact." The district court found that this sexual harassment was severe enough to make USI a "hostile work environment" for purposes of Title VII liability. The harassment was made more difficult for Landgraf because Williams was a union steward and was responsible for repairing and maintaining the machine Landgraf used in her work.

Landgraf told her supervisor, Bobby Martin, about Williams' harassment on several occasions but Martin took no action to prevent the harassment from continuing. Only when Landgraf reported the harassment to USI's personnel manager, Sam Forsgard, was Williams' behavior investigated. By interviewing the other female employees at the plant, the investigation found that four women corroborated Landgraf's reports of Williams' engaging in inappropriate touching and three women reported verbal harassment.

Williams denied the charges, contending that "they are all lying." Williams was given a written reprimand for his behavior, but was not suspended, although the written policies of USI list sexual harassment as an action "requiring suspension or dismissal." He was technically transferred to another department,

however, USI officials conceded that he would still be in Landgraf's work area on a regular basis. This transfer was not a form of discipline against Williams; as soon as Landgraf resigned he was transferred back to the original department.

The investigation dealt not only with Williams' behavior but also involved questioning employees about their relationship with Landgraf. On January 13, 1986, Forsgard, Wilson, and Martin met with Landgraf. According to Wilson's notes describing the meeting, Forsgard first told Landgraf that her claim had been investigated and that USI had taken the action it deemed appropriate. The meeting then turned to focus on Landgraf's problems in getting along with her co-workers. She was told that she was very unpopular and was "among [her] own worst enemies." When Landgraf asked whether anything was going to happen to Williams she was told that USI had taken what it considered appropriate action and to notify them if Williams attempted to take revenge.

After working just two more shifts, Landgraf left her job at USI. She left a letter addressed to her colleagues stating that "the stress that each one of you help [sic] to put on me, caused me to leave my job." The letter did not refer to the sexual harassment or to Williams by name. Approximately two days later, Landgraf spoke to her supervisor about her decision to resign and specifically attributed it to the harassment by Williams.

II.

It is uncontested that Barbara Landgraf suffered significant sexual harassment at the hands of John Williams during her employment with USI. This harassment was sufficiently severe to support a hostile work environment claim under Title VII. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986). She reported this harassment to her employer through supervisor Bobby Martin on several occasions and no corrective action was timely taken.

Because Landgraf voluntarily left her employment at USI, however, she must demonstrate that she was constructively

discharged in order to recover back pay as damages. In order to demonstrate constructive discharge, she must prove that "working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." *Bourque v. Powell Electrical Mfg. Co.*, 617 F.2d 61, 65 (5th Cir. 1980); *Jurgens v. EEOC*, 903 F.2d 386, 390-91 (5th Cir. 1990). The district court found that the sexual harassment by Williams was not severe enough that a reasonable person would have felt compelled to resign. This conclusion was strengthened by the district court's finding that at the time Landgraf resigned USI was taking action reasonably calculated to alleviate the harassment. The district court further found that "as evidenced by the language in her resignation letter, Landgraf's motivation for quitting her employment with USI was the conflicts and unpleasant relationships she had with her co-workers."

Landgraf argues first that the district court clearly erred in finding that USI had taken steps reasonably calculated to end the harassment. We disagree. Our review of the district court's factual finding is limited. As the Supreme Court has recently described the scope of our review: "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson v. Bessemer City*, 470 U.S. 564, 573-74, 105 S.Ct. 1504, 1511-12, 84 L. Ed.2d 518 (1985). There was evidence that USI had given Williams its most serious form of reprimand and acted to reduce his contact with Landgraf at the workplace. Landgraf testified that Williams continued to harass her after his reprimand, however, she did not report these incidents to USI before resigning. Title VII does not require that an employer use the most serious sanction available to punish an offender, particularly where, as here, this was the first documented offense by an individual employee. The district court did not clearly err in concluding that USI took steps reasonably calculated to end the harassment.

Landgraf argues that the finding of no constructive discharge was clearly erroneous. We disagree. The district court, after

hearing all the testimony in this case, concluded that Landgraf resigned for reasons unrelated to sexual harassment. The evidence in this case presented two possible reasons for Landgraf's decision to resign: problems with her co-workers, as evidenced by her note on sexual harassment as stated in conversation with Bobby Martin. Landgraf testified at trial that the sexual harassment was the reason for her resignation. She also stated that the reference to "the devil [who] has been your leader so far" in her resignation note was actually a reference to Williams. The district court concluded based upon this testimony and the note itself that the problems with her co-workers actually caused her resignation. Given these two plausible interpretations of the evidence, we must affirm the district court's finding. Landgraf also asserts that the conflicts she had with her co-workers were as a result of her problems with Williams. There was conflicting evidence on this question and the district court specifically found that Landgraf's conflict with her co-workers was unrelated to the sexual harassment by Williams. The district court did not clearly err in finding that Landgraf left her employment at USI for reasons unrelated to sexual harassment.

Moreover, even if the reason for Landgraf's departure was the harassment by Williams, the district court found that, particularly in light of the corrective actions taken by USI immediately before Landgraf resigned, the level of harassment was insufficient to support a finding of constructive discharge. To prove constructive discharge, the plaintiff must demonstrate a greater severity or pervasiveness of harassment than the minimum required to prove a hostile working environment. *Pittman v. Hattiesburg Municipal Separate School District*, 644 F.2d 1071, 1077 (5th Cir. 1981) (constructive discharge requires "aggravating factors"). The harassment here, while substantial, did not rise to the level of severity necessary for constructive discharge. Although USI's investigation of this incident may not have been overly sensitive to Landgraf's state of mind, the company had taken steps to alleviate the situation and told Landgraf to let them know of any further problems. A reasonable employee would not have felt compelled to resign immediately following the institution of measures which the district court found to be reasonably

calculated to stop the harassment. We cannot say that the district court clearly erred in rejecting the claim of constructive discharge.

III.

Landgraf asserts that the district court erred in failing to make findings of fact and conclusions of law with regard to her retaliation claim against USI. USI argues that no findings on the retaliation claim are necessary because Landgraf failed to prevail on her claim of constructive discharge. We agree.

An adverse negative employment action is a required element of a retaliation claim. *Collins v. Baptist Memorial Geriatric Center*, 937 F.2d 190, 193 (5th Cir. 1991). The only possible adverse employment action that Landgraf suffered after she complained to Martin about the sexual harassment would be the alleged constructive discharge. Because the district court found that the reason Landgraf resigned her position was her trouble getting along with her co-workers, she cannot prove constructive discharge on the basis of retaliation. As noted above, Landgraf asserts that her troubles with her co-workers were as a result of her complaints about Williams' harassment. However, the district court explicitly found to the contrary and we cannot say that that finding was clearly erroneous. Accordingly, Landgraf's retaliation claim cannot prevail because she suffered no adverse employment action as a result of her complaints. *Collins*, 937 F.2d at 193.

IV.

Landgraf argues that even if she fails to demonstrate that she was constructively discharged, she may still be awarded nominal damages which would carry with them an award of attorneys' fees. We recognize that some confusion may have arisen from our statement in *Joshi v. Florida State Univ.*, 646 F.2d 981, 991 n.3 (5th Cir. Unit B 1981), indicating in dicta that in some cases an employee who suffered from illegal discrimination but was ineligible for back pay might be entitled to nominal damages. Several circuit courts have explicitly held that such nominal

damages are available under Title VII in some cases. *Huddleston v. Roger Dean Chevrolet*, 845 F.2d 900, 905 (11th Cir. 1988); *Baker v. Weyerhaeuser Co.*, 903 F.2d 1342 (10th Cir. 1990). See also *Katz v. Dole*, 709 F.2d 251, 253 n.1 (4th Cir. 1983); *T & S Service Associates v. Crenson*, 666 F.2d 722, 728 n.8 (1st Cir. 1981). Only the Seventh Circuit has directly rejected the award of nominal damages as relief in Title VII cases. *Bohen v. City of East Chicago, Indiana*, 799 F.2d 1180, 1184 (7th Cir. 1986).

We conclude that the *Bohen* court's rejection of nominal damages as a Title VII remedy is the correct interpretation of the statutory scheme.¹ Title VII provides that where a court finds that an employer has engaged in unlawful employment practices, it may order action "which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay, . . . or any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g). We have consistently interpreted this provision to mean that "only equitable relief is available under Title VII." *Bennett v. Corroon & Black Corp.*, 845 F.2d 104, 106 (5th Cir. 1988). Nominal damages such as those awarded in *Huddleston* and *Baker* are legal, not equitable relief and are therefore outside the scope of remedies available under Title VII. *Bohen*, 799 F.2d at 1184 (damages unavailable to redress Title VII violations that do not result in discharge).

Landgraf also asserts that she is entitled to equitable relief in the form of a declaratory judgment, relying on the Eighth Circuit's opinion in *Bibbs v. Block*, 778 F.2d 1318 (8th Cir. 1985). We conclude that no declaratory judgment is appropriate in this case. The purpose of equitable relief under Title VII is "to restore the victim of discrimination to fruits and status of employments as if there had been no discrimination." *Bennett*, 845 F.2d at 106. Here, because Landgraf voluntarily left her employment she was not deprived of any fruits of employment

¹ We note, of course that under the amendments to Title VII in the Civil Rights Act of 1991, remedies will no longer be limited to equitable relief. However, for the reasons discussed below, those amendments do not apply to this case.

as a result of the sexual harassment. Her argument that she is entitled to a declaratory judgment for purposes of vindication because she prevailed on the issue of whether sexual harassment occurred must also fail. See *LaBoeuf v. Ramsey*, 503 F.Supp. 747 (D. Mass. 1980) (allowing declaratory judgment for purposes of vindication). USI did not dispute at trial the fact of Landgraf's sexual harassment. The only issues disputed were the propriety of USI's reaction to the harassment and Landgraf's reason for resigning. Landgraf did not prevail on either of these issues and the district court did not err in refusing to grant a declaratory judgment.

V.

Finally, we address the question of whether any provisions of the Civil Rights Act of 1991 apply to this case. Two provisions of the Act would affect this case if applicable: the addition of compensatory and punitive damages and the availability of a jury trial. Civil Rights Act of 1991, Pub.L. No. 102-166, §§ 102(a)(1), 102(c), 105 Stat. 1072-73 (1991).

We recently addressed the issue of the Act's retroactivity in *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363 (5th Cir. 1992), where we joined the other circuit courts which have ruled on the issue in holding that § 101(2)(b) of the Act does not apply to conduct occurring before the effective date of the Act. See *Luddington v. Indiana Bell Telephone Co.*, 966 F.2d 225 (7th Cir. 1992); *Fray v. Omaha World Herald Co.*, 960 F.2d 1370 (8th Cir. 1992); *Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir. 1992). We need not repeat here our discussion of the legislative history of the Act. For the reasons explained in *Johnson*, we conclude that there is no clear congressional intent on the general issue of the Act's application to pending cases. We must therefore turn to the legal principles applicable to statutes where Congress has remained silent on their retroactivity.

As we noted in *Johnson* the legal principles surrounding the retroactive application of statutes are somewhat uncertain in light of the Supreme Court's decisions in *Bradley v. Richmond School Board*, 416 U.S. 696, 94 S.Ct. 2006, 40 L. Ed. 2d 476 (1974) and

Bowen v. Georgetown University Hospital, 488 U.S. 204, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988). We need not resolve the recognized tension between the *Bradley* and *Bowen* cases, however, in order to resolve the issue facing us here. See *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 837, 110 S.Ct. 1570, 1572, 108 L.Ed.2d 842 (1990). Even under the standard set forth in *Bradley* we conclude that these two provisions of the Act should not be applied retroactively to this case.

The rule set forth in *Bradley* is that a court must "apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley*, 416 U.S. at 711, 94 S.Ct. at 2016. In determining whether retroactive application of a statute will wreak injustice, we consider "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." *Belser v. St. Paul Fire and Marine Ins. Co.*, 965 F.2d 5 (5th Cir. 1992), citing *Bradley*, 416 U.S. at 717, 94 S.Ct. at 2019.

We turn first to the provision allowing either party to request a jury trial. When this case was tried in February 1991, the district court applied the law in effect at that time when it conducted a bench trial on the Title VII claims. We are not persuaded that Congress intended to upset cases which were properly tried under the law at the time of trial. See *Bennett v. New Jersey*, 470 U.S. 632, 105 S.Ct. 1555, 84 L.Ed.2d 572 (1985) (Court would not presume that Congress intended new grant regulations to govern review of prior grants). To require USI to retry this case because of a statutory change enacted after the trial was completed would be an injustice and a waste of judicial resources. We apply procedural rules to pending cases, but we do not invalidate procedures followed before the new rule was adopted. *Belser*, 965 F.2d 5 at 9.

We now turn to whether the Act's provisions for compensatory and punitive damages apply to pending cases. We conclude that they do not. Retroactive application of this provision to conduct occurring before the Act would result in a manifest

injustice. The addition of compensatory and punitive damages to the remedies available to a prevailing Title VII plaintiff does not change the scope of the statute's coverage. That does not mean, however, that these are inconsequential changes in the Act. As Judge Posner notes in *Luddington*, "such changes can have as profound an impact on behavior outside the courtroom as avowedly substantive changes." Unlike allowing prevailing plaintiffs to recover attorneys' fees as in *Bradley*, the amended damage provisions of the Act are a seachange in employer liability for Title VII violations. For large employers, the total of compensatory and punitive damage for which they are potentially liable can reach \$300,000 per claim. Civil Rights Act of 1991, § 102(b)(3).

The measure of manifest injustice under *Bradley* is not controlled by formal labels of substantive or remedial changes. Instead, we focus on the practical effects the amendments have upon the settled expectations of the parties. There is a practical point at which a dramatic change in the remedial consequences of a rule works change in the normative reach of the rule itself. It would be an injustice within the meaning of *Bradley* to charge individual employers with anticipating this change in damages available under Title VII. Unlike *Bradley*, where the statutory change provided only an additional basis for relief already available, compensatory and punitive damages impose "an additional or unforeseeable obligation" contrary to the well-settled law before the amendments. 416 U.S. at 721, 94 S.Ct. at 2021. We conclude that the damage provisions of the Civil Rights Act of 1991 do not apply to conduct occurring before its effective date.

The judgment of the district court is AFFIRMED.

APPENDIX B

**FINDINGS OF FACT AND CONCLUSIONS OF LAW
OF THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF TEXAS**

May 22, 1991

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

May 22, 1991

BARBARA LANDGRAF	§	
	§	
VS.	§	CIVIL ACTION
	§	NO. TY-89-435-CA
USI FILM PRODUCTS,	§	
QUANTUM CHEMICAL	§	
CORPORATION and	§	
BONAR PACKAGING, INC.	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to Fed. R. Civ. P. 52(a), the Court enters its Findings of Fact and Conclusions of Law in this action.

I. FINDINGS OF FACT

1. During the course of her employment at USI Film Products ("USI") in Tyler, Texas, Plaintiff Barbara Landgraf ("Landgraf") was subjected to sexual harassment. The sexual harassment consisted of continuous and repeated inappropriate verbal comments and physical contact, the source of which was a fellow employee named John Williams.

2. Landgraf reported the sexual harassment to her immediate supervisor, Bobby Martin, on several occasions.

3. Martin took no actions reasonably calculated to halt the harassment.

4. Landgraf eventually reported the harassment to Sam Forsgard, who handled personnel matters at USI.

5. Forsgard immediately conducted an appropriate investigation into the allegations. Interviews with other female employees substantiated Landgraf's complaints of sexual harassment by John Williams. After a hearing on the harassment with Williams, he was transferred to another department as a remedial measure.

6. The remedial measures instituted by Forsgard alleviated the harassment Landgraf was subjected to by Williams.

7. Shortly after Forsgard instituted remedial measures regarding the harassment, Landgraf resigned her employment at USI.

8. Landgraf experienced difficulty in getting along with her co-workers. This situation was unrelated to the sexual harassment by John Williams.

9. As evidenced by the language in her resignation letter, Landgraf's motivation for quitting her employment with USI was the conflicts and unpleasant relationships she had with her co-workers.

10. Landgraf suffered mental anguish as a result of the sexual harassment she was subjected to while working at USI.

II. CONCLUSIONS OF LAW

1. A plaintiff must establish five elements in order to state a prima facie case of sexual harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), *et seq.*:

- (1) The employee belongs to a protected group;
- (2) The employee was subject to unwelcome sexual harassment;
- (3) The harassment complained of was based on sex;
- (4) The harassment complained of affected a "term, condition or privilege of employment"; and,

- (5) Respondeat superior, i. e., that the employer knew or should have known of the harassment in question and failed to take prompt remedial action.

Waltman v. International Paper Co., 875 F.2d 468, 477 (5th Cir. 1989).

2. Landgraf was subjected to harassment sufficiently severe to alter the conditions of Landgraf's employment and create an abusive working environment sufficient to support Landgraf's "hostile environment" claim. *See Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986).

3. Bobby Martin held a management position over Landgraf as her immediate supervisor. Landgraf's complaints to Martin constituted actual notice of the harassment to Landgraf's employer, USI. *See Waltman*, 875 F.2d at 478.

4. Because of Martin's repeated failure to take action when Landgraf reported the harassment to him, USI failed to take prompt remedial action to alleviate the sexual harassment to which Landgraf was subjected.

5. The evidence establishes a prima facie case that Landgraf suffered sexual harassment in violation of Title VII.

6. Landgraf was not constructively discharged from her employment with USI. In order to find that Landgraf was constructively discharged as a result of the sexual harassment, the discriminatory working conditions must have been so difficult or unpleasant that a reasonable person in Landgraf's position would have felt compelled to resign. *Borque v. Powell Electrical Manufacturing Co.*, 617 F.2d 61, 65 (5th Cir. 1980).

Although the harassment was serious enough to establish that a hostile work environment existed for Landgraf, it was not so severe that a reasonable person would have felt compelled to resign. This is particularly true in light of the fact that at the time Landgraf resigned from her job, USI had taken steps through Sam Forsgard to eliminate the hostile working environment arising from the sexual harassment. Landgraf voluntarily resigned from

her employment with USI for reasons unrelated to the sexual harassment in question.

7. The Court must now decide the issue of whether Landgraf is entitled to any recovery under Title VII in light of the determinations that Landgraf suffered from sexual harassment during her employment but that such harassment did not result in her discharge or termination, constructive or otherwise. Although the Fifth Circuit has not ruled on this exact point, it has been suggested in *dicta* that in such a situation nominal damages might be awarded as a remedy which would carry with it the awarding of attorney's fees and costs. *Joshi v. Florida State University*, 646 F.2d 981, 991 n. 33 (5th Cir. 1981). At least one other circuit has held that a plaintiff who establishes a prima facie case of sexual harassment can recover damages without a finding that she was discharged. *See Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900, 905 (11th Cir. 1988).

The statutory language of Title VII provides that "the court may . . . order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement . . . , back pay . . . , or any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g). The Seventh Circuit has noted that "[s]ince damages are not equitable relief, most courts have held that damages are not available to redress violations of Title VII that do not result in discharge." *Bohen v. City of East Chicago, Indiana*, 799 F.2d 1180, 1184 (7th Cir. 1986) (and cases cited therein).

The Court agrees with the Seventh Circuit's conclusion in *Bohen*:

We believe the better view, in accord with the majority of decisions, is that no damages are available under Title VII. If Congress wishes to amend the provisions of Title VII to provide a remedy of damages, it can do so. Until then, this court may only enforce the statute as written, and as currently written Title VII does not contemplate damages.

Id.

The Court finds that Landgraf is not entitled to equitable relief because her employment was not terminated in violation of Title VII. The Court further finds that Landgraf is not entitled to recover damages under 42 U.S.C. § 2000e-5(g).

8. Landgraf has conceded that her pendent state claims for intentional and negligent infliction of emotional distress are barred by the applicable statute of limitations.

Accordingly, IT IS ORDERED that Plaintiff's pendent state claims are DISMISSED with prejudice.

9. Costs shall be paid by the party incurring the same.

SIGNED this 20th day of May, 1991.

ROBERT M. PARKER, CHIEF JUDGE

APPENDIX C

**JUDGMENT OF THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF TEXAS**

May 22, 1991

C-1

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

May 22, 1991

BARBARA LANDGRAF

§

§

VS.

§

CIVIL ACTION
NO. TY-89-435-CA

§

USI FILM PRODUCTS,
QUANTUM CHEMICAL
CORPORATION and
BONAR PACKING, INC.

§

§

§

§

JUDGMENT

IT IS ORDERED that Plaintiff Barbara Landgraf take nothing
against Defendants USI Film Products, Quantum Chemical
Corporation and Bonar Packaging, Inc.

SIGNED this 20th day of May, 1991.

ROBERT M. PARKER, CHIEF JUDGE

APPENDIX D

THE CIVIL RIGHTS ACT OF 1991

Public Law 102-166
102d Congress

An Act

To amend the Civil Rights Act of 1964 to strengthen and improve Federal civil rights laws, to provide for damages in cases of intentional employment discrimination, to clarify provisions regarding disparate impact actions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Section 1. SHORT TITLE.

This Act may be cited as the "Civil Rights Act of 1991".

SEC. 2. FINDINGS.

The Congress finds that—

(1) additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace;

(2) the decision of the Supreme Court in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) has weakened the scope and effectiveness of Federal civil rights protections; and

(3) legislation is necessary to provide additional protections against unlawful discrimination in employment.

SEC. 3. PURPOSES.

The purposes of this Act are—

(1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace;

(2) to codify the concepts of "business necessity" and "job related" enunciated by the Supreme Court in *Griggs v.*

Duke Power Co., 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989);

(3) to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); and

(4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.

TITLE I—FEDERAL CIVIL RIGHTS REMEDIES

SEC. 101. PROHIBITION AGAINST ALL RACIAL DISCRIMINATION IN THE MAKING AND ENFORCEMENT OF CONTRACTS.

Section 1977 of the Revised Statutes (42 U.S.C. 1981) is amended—

(1) by inserting “(a)” before “All persons within”; and

(2) by adding at the end the following new subsections:

“(b) For purposes of this section, the term ‘make and enforce contracts’ includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

“(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.”.

SEC. 102. DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION.

The Revised Statutes are amended by inserting after section 1977 (42 U.S.C. 1981) the following new section:

“SEC. 1977A. DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION IN EMPLOYMENT.

“(a) RIGHT OF RECOVERY.—

“(1) CIVIL RIGHTS.—In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3), and provided that the complaining party cannot recover under section 1977 of the Revised Statutes (42 U.S.C. 1981), the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

“(2) DISABILITY.—In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 505(a)(1) of the Rehabilitation Act of 1973 (29 U.S.C. 794a(a)(1)), respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791) and the regulations implementing section 501, or who violated the requirements of section 501 of the Act or the regulations implementing section 501 concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

“(3) REASONABLE ACCOMMODATION AND GOOD FAITH EFFORT.—In cases where a discriminatory practice

involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 or regulations implementing section 501 of the Rehabilitation Act of 1973, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

“(b) COMPENSATORY AND PUNITIVE DAMAGES.—

“(1) DETERMINATION OF PUNITIVE DAMAGES.—A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

“(2) EXCLUSIONS FROM COMPENSATORY DAMAGES.—Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964.

“(3) LIMITATIONS.—The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party—

“(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$50,000;

“(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more

calendar weeks in the current or preceding calendar year, \$100,000; and

“(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$200,000; and

“(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$300,000.

“(4) CONSTRUCTION.—Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1977 of the Revised Statutes (42 U.S.C. 1981).

“(c) JURY TRIAL.—If a complaining party seeks compensatory or unitive [sic] damages under this section—

“(1) any party may demand a trial by jury; and

“(2) the court shall not inform the jury of the limitations described in subsection (b)(3).

“(d) DEFINITIONS.—As used in this section:

“(1) COMPLAINING PARTY.—The term ‘complaining party’ means—

“(A) in the case of a person seeking to bring an action under subsection (a)(1), the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); or

“(B) in the case of a person seeking to bring an action under subsection (a)(2), the Equal Employment Opportunity Commission, the Attorney General, a person who may bring an action or proceeding under section 505(a)(1) of the Rehabilitation Act of 1973 (29 U.S.C. 794a(a)(1)), or a person who may bring an action or proceeding under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.).

“(2) DISCRIMINATORY PRACTICE.—The term ‘discriminatory practice’ means the discrimination described in paragraph (1), or the discrimination or the violation described in paragraph (2), of subsection (a).

SEC. 103. ATTORNEY'S FEES.

The last sentence of section 722 of the Revised Statutes (42 U.S.C. 1988) is amended by inserting ", 1977A" after "1977".

SEC. 104. DEFINITIONS.

Section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e) is amended by adding at the end the following new subsections:

"(l) The term 'complaining party' means the Commission, the Attorney General, or a person who may bring an action or proceeding under this title.

"(m) The term 'demonstrates' means meets the burdens of production and persuasion.

"(n) The term 'respondent' means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to Section 717."

SEC. 105. BURDEN OF PROOF IN DISPARATE IMPACT CASES.

(a) Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) is amended by adding at the end the following new subsection:

"(k)(1)(A) An unlawful employment practice based on disparate impact is established under this title only if—

"(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

"(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

"(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

"(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

"(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of 'alternative employment practice'.

"(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this title.

"(3) Notwithstanding any other provision of this title, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act or any other provision of Federal law, shall be considered an unlawful employment practice under this title only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin."

(b) No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S 15276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that relates to Wards Cove—Business necessity/cumulation/alternative business practice.

SEC. 106. PROHIBITION AGAINST DISCRIMINATORY USE OF TEST SCORES.

Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) (as amended by Section 105) is further amended by adding at the end the following new subsection:

“(l) It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.”.

SEC. 107. CLARIFYING PROHIBITION AGAINST IMPERMISSIBLE CONSIDERATION OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN IN EMPLOYMENT PRACTICES.

(a) **IN GENERAL**—Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) (as amended by Sections 105 and 106) is further amended by adding at the end the following new subsection:

“(m) Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”.

(b) **ENFORCEMENT PROVISIONS**.—Section 706(g) of such Act (42 U.S.C. 2000e-5(g)) is amended—

(1) by designating the first through third sentences as paragraph (1);

(2) by designating the fourth sentence as paragraph (2)(A) and indenting accordingly; and

(3) by adding at the end the following new subparagraph:

“(B) On a claim in which an individual proves a violation under section 703(m) and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

“(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney’s fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 703(m); and

“(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).”.

SEC. 108. FACILITATING PROMPT AND ORDERLY RESOLUTION OF CHALLENGES TO EMPLOYMENT PRACTICES IMPLEMENTING LITIGATED OR CONSENT JUDGMENTS OR ORDERS.

Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) (as amended by sections 105, 106, and 107 of this title) is further amended by adding at the end the following new subsection:

“(n)(1)(A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

“(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws—

“(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had—

“(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

“(II) a reasonable opportunity to present objections to such judgment or order; or

"(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

"(2) Nothing in this subsection shall be construed to—

"(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

"(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;

"(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

"(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

"(3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of title 28, United States Code."

SEC. 109. PROTECTION OF EXTRATERRITORIAL EMPLOYMENT.

(a) **DEFINITION OF EMPLOYEE.**—Section 701(f) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(f)) and section 101(4) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111(4)) are each amended by adding at the end the following: "With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States."

(b) **EXEMPTION.**—

(1) **CIVIL RIGHTS ACT OF 1964.**—Section 702 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-1) is amended—

(A) by inserting "(a)" after Sec. 702."; and

(B) by adding at the end the following:

"(b) It shall not be unlawful under section 703 or 704 for an employer (or a corporation controlled by an employer), labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining (including on-the-job training programs) to take any action otherwise prohibited by such section, with respect to an employee in a workplace in a foreign country if compliance with such section would cause such employer (or such corporation), such organization, such agency, or such committee to violate the law of the foreign country in which such workplace is located.

"(c)(1) If an employer controls a corporation whose place of incorporation is a foreign country, any practice prohibited by section 703 or 704 engaged in by such corporation shall be presumed to be engaged in by such employer.

"(2) Sections 703 and 704 shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

"(3) For purposes of this subsection, the determination of whether an employer controls a corporation shall be based on—

"(A) the interrelation of operations;

"(B) the common management;

"(C) the centralized control of labor relations; and

"(D) the common ownership or financial control, of the employer and the corporation."

(2) **AMERICANS WITH DISABILITIES ACT OF 1990.**—Section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112) is amended—

(A) by redesignating subsection (c) as subsection (d); and

(B) by inserting after subsection (b) the following new subsection:

"(c) **COVERED ENTITIES IN FOREIGN COUNTRIES.**—

"(1) **IN GENERAL.**—It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee

in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

“(2) CONTROL OF CORPORATION.—

“(A) PRESUMPTION.—If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

“(B) EXCEPTION.—This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

“(C) DETERMINATION.—For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on—

“(i) the interrelation of operations;

“(ii) the common management;

“(iii) the centralized control of labor relations;

and

“(iv) the common ownership of financial control, of the employer and the corporation.”.

(c) APPLICATION OF AMENDMENTS.—The amendments made by this section shall not apply with respect to conduct occurring before the date of the enactment of this Act.

SEC. 110. TECHNICAL ASSISTANCE TRAINING INSTITUTE.

(a) TECHNICAL ASSISTANCE.—Section 705 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4) is amended by adding at the end the following new subsection:

“(j)(1) The Commission shall establish a Technical Assistance Training Institute, through which the Commission shall provide technical assistance and training regarding the laws and regulations enforced by the Commission.

“(2) An employer or other entity covered under this title shall not be excused from compliance with the requirements of this title because of any failure to receive technical assistance under this subsection.

“(3) There are authorized to be appropriated to carry out this subsection such sums as may be necessary for fiscal year 1992.”.

(b) EFFECTIVE DATE.—The amendment made by this section shall take effect on the date of the enactment of this Act.

SEC. 111. EDUCATION AND OUTREACH.

Section 705(h) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4(h)) is amended—

(1) by inserting “(1)” after “(h)”;

(2) by adding at the end the following new paragraph:

“(2) In exercising its powers under this title, the Commission shall carry out educational and outreach activities (including dissemination of information in languages other than English) targeted to—

“(A) individuals who historically have been victims of employment discrimination and have not been equitably served by the Commission; and

“(B) individuals on whose behalf the Commission has authority to enforce any other law prohibiting employment discrimination, concerning rights and obligations under this title or such law, as the case may be.”.

SEC. 112. EXPANSION OF RIGHT TO CHALLENGE DISCRIMINATORY SENIORITY SYSTEMS.

Section 706(e) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(e)) is amended—

(1) by inserting “(1)” before “A charge under this section”; and

(2) by adding at the end the following new paragraph:

“(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this title (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by

the application of the seniority system or provision of the system.”.

SEC. 113. AUTHORIZING AWARD OF EXPERT FEES.

(a) **REVISED STATUTES.**—Section 722 of the Revised Statutes is amended—

(1) by designating the first and second sentences as subsections (a) and (b), respectively, and indenting accordingly; and

(2) by adding at the end the following new subsection:

“(c) In awarding an attorney’s fee under subsection (b) in any action or proceeding to enforce a provision of section 1977 or 1977A of the Revised Statutes, the court, in its discretion, may include expert fees as part of the attorney’s fee.”.

(b) **CIVIL RIGHTS ACT OF 1964.**—Section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)) is amended by inserting “(including expert fees)” after “attorney’s fee”.

SEC. 114. PROVIDING FOR INTEREST AND EXTENDING THE STATUTE OF LIMITATIONS IN ACTIONS AGAINST THE FEDERAL GOVERNMENT.

Section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16) is amended—

(1) in subsection (c), by striking “thirty days” and inserting “90 days”; and

(2) in subsection (d), by inserting before the period”, and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.”.

SEC. 115. NOTICE OF LIMITATIONS PERIOD UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967.

Section 7(e) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 626(e)) is amended—

(1) by striking paragraph (2);

(2) by striking the paragraph designation in paragraph (1);

(3) by striking “Section 6 and” and inserting “Section”; and

(4) by adding at the end the following:

“If a charge filed with the Commission under this Act is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 11(a) against the respondent named in the charge within 90 days after the date of the receipt of such notice.”.

SEC. 116. LAWFUL COURT-ORDERED REMEDIES, AFFIRMATIVE ACTION, AND CONCILIATION AGREEMENTS NOT AFFECTED.

Nothing in the amendments made by this title shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law.

SEC. 117. COVERAGE OF HOUSE OF REPRESENTATIVES AND THE AGENCIES OF THE LEGISLATIVE BRANCH.

(a) **COVERAGE OF THE HOUSE OF REPRESENTATIVES.**—

(1) **IN GENERAL.**—Notwithstanding any provision of title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) or of other law, the purposes of such title shall, subject to paragraph (2), apply in their entirety to the House of Representatives.

(2) **EMPLOYMENT IN THE HOUSE.**—

(A) **APPLICATION.**—The rights and protections under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) shall, subject to subparagraph (B), apply with respect to any employee in an employment position in the House of Representatives and any employing authority of the House of Representatives.

(B) **ADMINISTRATION.**—

(i) **IN GENERAL.**—In the administration of this paragraph, the remedies and procedures made applicable pursuant to the resolution described in clause (ii) shall apply exclusively.

(ii) **RESOLUTION.**—The resolution referred to in clause (i) is the Fair Employment Practices Resolution (House Resolution 558 of the One Hundredth Congress, as agreed to October 4, 1988), as incorporated into the Rules of the House of Representatives of the One Hundred Second Congress as Rule LI, or any other provision that continues in effect the provisions of such resolution.

(C) **EXERCISE OF RULEMAKING POWER.**—The provisions of subparagraph (B) are enacted by the House of Representatives as an exercise of the rulemaking power of the House of Representatives, with full recognition of the right of the House to change its rules, in the same manner, and to the same extent as in the case of any other rule of the House.

(b) INSTRUMENTALITIES OF CONGRESS.—

(1) **IN GENERAL.**—The rights and protections under this title and title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) shall, subject to paragraph (2), apply with respect to the conduct of each instrumentality of the Congress.

(2) **ESTABLISHMENT OF REMEDIES AND PROCEDURES BY INSTRUMENTALITIES.**—The chief official of each instrumentality of the Congress shall establish remedies and procedures to be utilized with respect to the rights and protections provided pursuant to paragraph (1). Such remedies and procedures shall apply exclusively, except for the employees who are defined as Senate employees, in section 301(c)(1).

(3) **REPORT TO CONGRESS.**—The chief official of each instrumentality of the Congress shall, after establishing remedies and procedures for purposes of paragraph (2), submit to the Congress a report describing the remedies and procedures.

(4) **DEFINITION OF INSTRUMENTALITIES.**—For purposes of this section, instrumentalities of the Congress include the following: the Architect of the Capitol, the Congressional Budget Office, the General Accounting Office, the Government Printing Office, the Office of Technology Assessment, and the United States Botanic Garden.

(5) **CONSTRUCTION.**—Nothing in this section shall alter the enforcement procedures for individuals protected under section 717 of title VII for the Civil Rights Act of 1964 (42 U.S.C. 2000e-16).

SEC. 118. ALTERNATIVE MEANS OF DISPUTE RESOLUTION.

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.

TITLE II—GLASS CEILING

SEC. 201. SHORT TITLE.

This title may be cited as the “Glass Ceiling Act of 1991”.

SEC. 202. FINDINGS AND PURPOSE.

(a) **FINDINGS.**— Congress finds that—

(1) despite a dramatically growing presence in the workplace, women and minorities remain underrepresented in management and decisionmaking positions in business;

(2) artificial barriers exist to the advancement of women and minorities in the workplace;

(3) United States corporations are increasingly relying on women and minorities to meet employment requirements and

are increasingly aware of the advantages derived from a diverse work force;

(4) the "Glass Ceiling Initiative" undertaken by the Department of Labor, including the release of the report entitled "Report on the Glass Ceiling Initiative", has been instrumental in raising public awareness of—

(A) the underrepresentation of women and minorities at the management and decisionmaking levels in the United States work force;

(B) the underrepresentation of women and minorities in line functions in the United States work force;

(C) the lack of access for qualified women and minorities to credential-building developmental opportunities; and

(D) the desirability of eliminating artificial barriers to the advancement of women and minorities to such levels;

(5) the establishment of a commission to examine issues raised by the Glass Ceiling Initiative would help—

(A) focus greater attention on the importance of eliminating artificial barriers to the advancement of women and minorities to management and decisionmaking positions in business; and

(B) promote work force diversity;

(6) a comprehensive study that includes analysis of the manner in which management and decisionmaking positions are filled, the developmental and skill-enhancing practices used to foster the necessary qualifications for advancement, and the compensation programs and reward structures utilized in the corporate sector would assist in the establishment of practices and policies promoting opportunities for, and eliminating artificial barriers to, the advancement of women and minorities to management and decisionmaking positions; and

(7) a national award recognizing employers whose practices and policies promote opportunities for, and eliminate artificial barriers to, the advancement of women and minorities will foster the advancement of women and minorities into higher level positions by—

(A) helping to encourage United States companies to modify practices and policies to promote opportunities for, and eliminate artificial barriers to, the upward mobility of women and minorities; and

(B) providing specific guidance for other United States employers that wish to learn how to revise practices and policies to improve the access and employment opportunities of women and minorities.

(b) **PURPOSE.**—The purpose of this title is to establish—

(1) a Glass Ceiling Commission to study—

(A) the manner in which business fills management and decisionmaking positions;

(B) the developmental and skill-enhancing practices used to foster the necessary qualifications for advancement into such positions; and

(C) the compensation programs and reward structures currently utilized in the workplace; and

(2) an annual award for excellence in promoting a more diverse skilled work force at the management and decisionmaking levels in business.

SEC. 203. ESTABLISHMENT OF GLASS CEILING COMMISSION.

(a) **IN GENERAL.**—There is established a Glass Ceiling Commission (referred to in this title as the "Commission"), to conduct a study and prepare recommendations concerning—

(1) eliminating artificial barriers to the advancement of women and minorities; and

(2) increasing the opportunities and developmental experiences of women and minorities to foster advancement of women and minorities to management and decisionmaking positions in business.

(b) **MEMBERSHIP.**—

(1) **COMPOSITION.**—The Commission shall be composed of 21 members, including—

(A) six individuals appointed by the President;

(B) six individuals appointed jointly by the Speaker of the House of Representatives and the Majority Leader of the Senate;

(C) one individual appointed by the Majority Leader of the House of Representatives;

(D) one individual appointed by the Minority Leader of the House of Representatives;

(E) one individual appointed by the Majority Leader of the Senate;

(F) one individual appointed by the Minority Leader of the Senate;

(G) two Members of the House of Representatives appointed jointly by the Majority Leader and the Minority Leader of the House of Representatives;

(H) two Members of the Senate appointed jointly by the Majority Leader and the Minority Leader of the Senate; and

(I) the Secretary of Labor.

(2) **CONSIDERATIONS.**—In making appointments under subparagraphs (A) and (B) of paragraph (1), the appointing authority shall consider the background of the individuals, including whether the individuals—

(A) are members of organizations representing women and minorities, and other related interest groups;

(B) hold management or decisionmaking positions in corporation or other business entities recognized as leaders on issues relating to equal employment opportunity; and

(C) possess academic expertise or other recognized ability regarding employment issues.

(3) **BALANCE.**—In making the appointments under subparagraphs (A) and (B) of paragraph (1), each appointing authority shall seek to include an appropriate balance of appointees from among the groups of appointees described in subparagraphs (A), (B), and (C) of paragraph (2).

(c) **CHAIRPERSON.**—The Secretary of Labor shall serve as the Chairperson of the Commission.

(d) **TERM OF OFFICE.**—Members shall be appointed for the life of the Commission.

(e) **VACANCIES.**—Any vacancy occurring in the membership of the Commission shall be filled in the same manner as the original appointment for the position being vacated. The vacancy shall not affect the power of the remaining members to execute the duties of the Commission.

(f) **MEETINGS.**—

(1) **MEETINGS PRIOR TO COMPLETION OF REPORT.**—The Commission shall meet not fewer than five times in connection with and pending the completion of the report described in section 204(b). The Commission shall hold additional meetings if the Chairperson or a majority of the members of the Commission request the additional meetings in writing.

(2) **MEETINGS AFTER COMPLETION OF REPORT.**—The Commission shall meet once each year after the completion of the report described in section 204(b). The Commission shall hold additional meetings if the Chairperson or a majority of the members of the Commission request the additional meetings in writing.

(g) **QUORUM.**—A majority of the Commission shall constitute a quorum for the transaction of business.

(h) **COMPENSATION AND EXPENSES.**—

(1) **COMPENSATION.**—Each member of the Commission who is not an employee of the Federal Government shall receive compensation at the daily equivalent of the rate specified for level V of the Executive Schedule under section 5316 of title 5, United States Code, for each day the member is engaged in the performance of duties for the Commission, including attendance at meetings and conferences of the Commission, and travel to conduct the duties of the Commission.

(2) **TRAVEL EXPENSES.**—Each member of the Commission shall receive travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of title 5, United States Code, for each day the member is engaged in the performance of duties away from the home or regular place of business of the member.

(3) **EMPLOYMENT STATUS.**—A member of the Commission, who is not otherwise an employee of the Federal Government, shall not be deemed to be an employee of the Federal Government except for the purposes of—

(A) the tort claims provisions of chapter 171 of title 28, United States Code; and

(B) subchapter I of chapter 81 of title 5, United States Code, relating to compensation for work injuries.

SEC. 204. RESEARCH ON ADVANCEMENT OF WOMEN AND MINORITIES TO MANAGEMENT AND DECISIONMAKING POSITIONS IN BUSINESS.

(a) **ADVANCEMENT STUDY.**—The Commission shall conduct a study of opportunities for, and artificial barriers to, the advancement of women and minorities to management and decisionmaking positions in business. In conducting the study, the Commission shall—

(1) examine the preparedness of women and minorities to advance to management and decisionmaking positions in business;

(2) examine the opportunities for women and minorities to advance to management and decisionmaking positions in business;

(3) conduct basic research into the practices, policies, and manner in which management and decisionmaking positions in business are filled;

(4) conduct comparative research of businesses and industries in which women and minorities are promoted to management and decisionmaking positions, and businesses and industries in which women and minorities are not promoted to management and decisionmaking positions;

(5) compile a synthesis of available research on programs and practices that have successfully led to the advancement of women and minorities to management and decisionmaking positions in business, including training programs, rotational assignments, developmental programs, reward programs, employee benefit structures, and family leave policies; and

(6) examine any other issues and information relating to the advancement of women and minorities to management and decisionmaking positions in business.

(b) **REPORT.**—Not later than 15 months after the date of the enactment of this Act, the Commission shall prepare and submit to the President and the appropriate committees of Congress a written report containing—

(1) the findings and conclusions of the Commission resulting from the study conducted under subsection (a); and

(2) recommendations based on the findings and conclusions described in paragraph (1) relating to the promotion of opportunities for, and elimination of artificial barriers to, the advancement of women and minorities to management and decisionmaking positions in business, including recommendations for—

(A) policies and practices to fill vacancies at the management and decisionmaking levels;

(B) developmental practices and procedures to ensure that women and minorities have access to opportunities to gain the exposure, skills, and expertise necessary to assume management and decisionmaking positions;

(C) compensation programs and reward structures utilized to reward and retain key employees; and

(D) the use of enforcement (including such enforcement techniques as litigation, complaint investigations, compliance reviews, conciliation, administrative regulations, policy guidance, technical assistance, training, and public education) of Federal equal employment opportunity laws by Federal agencies as a means of eliminating artificial barriers to the advancement of women and minorities in employment.

(c) **ADDITIONAL STUDY.**—The Commission may conduct such additional study of the advancement of women and minorities to management and decisionmaking positions in business as a majority of the members of the Commission determines to be necessary.

SEC. 205. ESTABLISHMENT OF THE NATIONAL AWARD FOR DIVERSITY AND EXCELLENCE IN AMERICAN EXECUTIVE MANAGEMENT.

(a) **IN GENERAL.**—There is established the National Award for Diversity and Excellence in American Executive Management, which shall be evidenced by a medal bearing the inscription "Frances Perkins-Elizabeth Hanford Dole National Award for Diversity and Excellence in American Executive Management". The medal shall be of such design and materials, and bear such additional inscriptions, as the Commission may prescribe.

(b) **CRITERIA FOR QUALIFICATION.**—To qualify to receive an award under this section a business shall—

(1) submit a written application to the Commission, at such time, in such manner, and containing such information as the Commission may require, including at a minimum information that demonstrates that the business has made substantial effort to promote the opportunities and developmental experiences of women and minorities to foster advancement to management and decisionmaking positions within the business, including the elimination of artificial barriers to the advancement of women and minorities, and deserves special recognition as a consequence; and

(2) meet such additional requirements and specifications as the Commission determines to be appropriate.

(c) **MAKING AND PRESENTATION OF AWARD.**—

(1) **AWARD.**—After receiving recommendations from the Commission, the President or the designated representative of the President shall annually present the award described in subsection (a) to businesses that meet the qualifications described in subsection (b).

(2) **PRESENTATION.**—The President or the designated representative of the President shall present the award with such ceremonies as the President or the designated representative of the President may determine to be appropriate.

(3) **PUBLICITY.**—A business that receives an award under this section may publicize the receipt of the award and use the award in its advertising, if the business agrees to help

other United States businesses improve with respect to the promotion of opportunities and developmental experiences of women and minorities to foster the advancement of women and minorities to management and decisionmaking positions.

(d) **BUSINESS.**—For the purposes of this section, the term "business" includes—

(1)(A) a corporation including nonprofit corporations;

(B) a partnership;

(C) a professional association;

(D) a labor organization; and

(E) a business entity similar to an entity described in subparagraphs (A) through (D);

(2) an education referral program, a training program, such as an apprenticeship or management training program or a similar program; and

(3) a joint program formed by a combination of any entities described in paragraph (1) or (2).

SEC. 206. POWERS OF THE COMMISSION.

(a) **IN GENERAL.**—The Commission is authorized to—

(1) hold such hearings and sit and act at such times;

(2) take such testimony;

(3) have such printing and binding done;

(4) enter into such contracts and other arrangements;

(5) make such expenditures; and

(6) take such other actions;

as the Commission may determine to be necessary to carry out the duties of the Commission.

(b) **OATHS.**—Any member of the Commission may administer oaths or affirmations to witnesses appearing before the Commission.

(c) **OBTAINING INFORMATION FROM FEDERAL AGENCIES.**—The Commission may secure directly from any Federal agency such information as the Commission may require to carry out its duties.

(d) **VOLUNTARY SERVICE.**—Notwithstanding section 1342 of title 31, United States Code, the Chairperson of the

Commission may accept for the Commission voluntary services provided by a member of the Commission.

(e) **GIFTS AND DONATIONS.**—The Commission may accept, use, and dispose of gifts or donations of property in order to carry out the duties of the Commission.

(f) **USE OF MAIL.**—The Commission may use the United States mails in the same manner and under the same conditions as Federal agencies.

SEC. 207. CONFIDENTIALITY OF INFORMATION.

(a) **INDIVIDUAL BUSINESS INFORMATION.**—

(1) **IN GENERAL.**—Except as provided in paragraph (2), and notwithstanding section 552 of title 5, United States Code, in carrying out the duties of the Commission, including the duties described in sections 204 and 205, the Commission shall maintain the confidentiality of all information that concerns—

(A) the employment practices and procedures of individual businesses; or

(B) individual employees of the businesses.

(2) **CONSENT.**—The content of any information described in paragraph (1) may be disclosed with the prior written consent of the business or employee, as the case may be, with respect to which the information is maintained.

(b) **AGGREGATE INFORMATION.**—In carrying out the duties of the Commission, the Commission may disclose—

(1) information about the aggregate employment practices or procedures of a class or group of businesses; and

(2) information about the aggregate characteristics of employees of the businesses, and related aggregate information about the employees.

SEC. 208. STAFF AND CONSULTANTS.

(a) **STAFF.**—

(1) **APPOINTMENT AND COMPENSATION.**—The Commission may appoint and determine the compensation of

such staff as the Commission determines to be necessary to carry out the duties of the Commission.

(2) **LIMITATIONS.**—The rate of compensation for each staff member shall not exceed the daily equivalent of the rate specified for level V of the Executive Schedule under section 5316 of title 5, United States Code for each day the staff member is engaged in the performance of duties for the Commission. The Commission may otherwise appoint and determine the compensation of staff without regard to the provisions of title 5, United States Code, that govern appointments in the competitive service, and the provisions of chapter 51 and subchapter III of chapter 53 of title 5, United States Code, that relate to classification and General Schedule pay rates.

(b) **EXPERTS AND CONSULTANTS.**—The Chairperson of the Commission may obtain such temporary and intermittent services of experts and consultants and compensate the experts and consultants in accordance with section 3109(b) of title 5, United States Code, as the Commission determines to be necessary to carry out the duties of the Commission.

(c) **DETAIL OF FEDERAL EMPLOYEES.**—On the request of the Chairperson of the Commission, the head of any Federal agency shall detail, without reimbursement, any of the personnel of the agency to the Commission to assist the Commission in carrying out its duties. Any detail shall not interrupt or otherwise affect the civil service status or privileges of the Federal employee.

(d) **TECHNICAL ASSISTANCE.**—On the request of the Chairperson of the Commission, the head of a Federal agency shall provide such technical assistance to the Commission as the Commission determines to be necessary to carry out its duties.

SEC. 209. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated to the Commission such sums as may be necessary to carry out the provisions of this title. The sums shall remain available until expended, without fiscal year limitation.

SEC. 210. TERMINATION.

(a) COMMISSION.—Notwithstanding section 15 of the Federal Advisory Committee Act (5 U.S.C. App.), the Commission shall terminate 4 years after the date of the enactment of this Act.

(b) AWARD.—The authority to make awards under section 205 shall terminate 4 years after the date of the enactment of this Act.

TITLE III—GOVERNMENT EMPLOYEE RIGHTS

SEC. 301. GOVERNMENT EMPLOYEE RIGHTS ACT OF 1991.

(a) SHORT TITLE.—This title may be cited as the “Government Employee Rights Act of 1991”.

(b) PURPOSE.—The purpose of this title is to provide procedures to protect the right of Senate and other government employees, with respect to their public employment, to be free of discrimination on the basis of race, color, religion, sex, national origin, age, or disability.

(c) DEFINITIONS.—For purposes of this title:

(1) SENATE EMPLOYEE.—The term “Senate employee” or “employee” means—

(A) any employee whose pay is disbursed by the Secretary of the Senate;

(B) any employee of the Architect of the Capitol who is assigned to the Senate Restaurants or to the Superintendent of the Senate Office Buildings;

(C) any applicant for a position that will last 90 days or more and that is to be occupied by an individual described in subparagraph (A) or (B); or

(D) any individual who was formerly an employee described in subparagraph (A) or (B) and whose claim of a violation arises out of the individual’s Senate employment.

(2) HEAD OF EMPLOYING OFFICE.—The term “head of employing office” means the individual who has final authority to appoint, hire, discharge, and set the terms, conditions or privileges of the Senate employment of an employee.

(3) VIOLATION.—The term “violation” means a practice that violates section 302 of this title.

SEC. 302. DISCRIMINATORY PRACTICES PROHIBITED.

All personnel actions affecting employees of the Senate shall be made free from any discrimination based on—

(1) race, color, religion, sex, or national origin, within the meaning of section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16);

(2) age, within the meaning of section 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a); or

(3) handicap or disability, within the meaning of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791) and sections 102-104 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112-14).

SEC. 303. ESTABLISHMENT OF OFFICE OF SENATE FAIR EMPLOYMENT PRACTICES.

(a) IN GENERAL.—There is established, as an office of the Senate, the Office of Senate Fair Employment Practices (referred to in this title as the “Office”), which shall—

(1) administer the processes set forth in sections 305 through 307;

(2) implement programs for the Senate to heighten awareness of employee rights in order to prevent violations from occurring.

(b) DIRECTOR.—

(1) IN GENERAL.—The Office shall be headed by a Director (referred to in this title as the “Director”) who shall be appointed by the President pro tempore, upon the recommendation of the Majority Leader in consultation with

the Minority Leader. The appointment shall be made without regard to political affiliation and solely on the basis of fitness to perform the duties of the position. The Director shall be appointed for a term of service which shall expire at the end of the Congress following the Congress during which the Director is appointed. A Director may be reappointed at the termination of any term of service. The President pro tempore, upon the joint recommendation of the Majority Leader in consultation with the Minority Leader, may remove the Director at any time.

(2) **SALARY.**—The President pro tempore, upon the recommendation of the Majority Leader in consultation with the Minority Leader, shall establish the rate of pay for the Director. The salary of the Director may not be reduced during the employment of the Director and shall be increased at the same time and in the same manner as fixed statutory salary rates within the Senate are adjusted as a result of annual comparability increases.

(3) **ANNUAL BUDGET.**—The Director shall submit an annual budget request for the Office to the Committee on Appropriations.

(4) **APPOINTMENT OF DIRECTOR.**—The first Director shall be appointed and begin service within 90 days after the date of enactment of this Act, and thereafter the Director shall be appointed and begin service within 30 days after the beginning of the session of the Congress immediately following the termination of a Director's term of service or within 60 days after a vacancy occurs in the position.

(c) **STAFF OF THE OFFICE.**—

(1) **APPOINTMENT.**—The Director may appoint and fix the compensation of such additional staff, including hearing officers, as are necessary to carry out the purposes of this title.

(2) **DETAILEES.**—The Director may, with the prior consent of the Government department or agency concerned and the Committee on Rules and Administration, use on a reimbursable or nonreimbursable basis the services of any such department or agency, including the services of members

or personnel of the General Accounting Office Personnel Appeals Board.

(3) **CONSULTANTS.**—In carrying out the functions of the Office, the Director may procure the temporary (not to exceed 1 year) or intermittent services of individual consultants, or organizations thereof, in the same manner and under the same conditions as a standing committee of the Senate may procure such services under section 202(i) of the Legislative Reorganization Act of 1946 (2 U.S.C. 72a(i)).

(d) **EXPENSES OF THE OFFICE.**—In fiscal year 1992, the expenses of the Office shall be paid out of the Contingent Fund of the Senate from the appropriation account Miscellaneous Items. Beginning in fiscal year 1993, and for each fiscal year thereafter, there is authorized to be appropriated for the expenses of the Office such sums as shall be necessary to carry out its functions. In all cases, expenses shall be paid out of the Contingent Fund of the Senate upon vouchers approved by the Director, except that a voucher shall not be required for—

(1) the disbursement of salaries of employees who are paid at an annual rate;

(2) the payment of expenses for telecommunications services provided by the Telecommunications Department, Sergeant at Arms, United States Senate;

(3) the payment of expenses for stationery supplies purchased through the Keeper of the Stationery, United States Senate;

(4) the payment of expenses for postage to the Postmaster, United States Senate; and

(5) the payment of metered charges on copying equipment provided by the Sergeant at Arms, United States Senate.

The Secretary of the Senate is authorized to advance such sums as may be necessary to defray the expenses incurred in carrying out this title. Expenses of the Office shall include authorized travel for personnel of the Office.

(e) **RULES OF THE OFFICE.**—The Director shall adopt rules governing the procedures of the Office, including the procedures of hearing boards, which rules shall be submitted to the President pro tempore for publication in the Congressional Record. The rules may be amended in the same manner. The

Director may consult with the Chairman of the Administrative Conference of the United States on the adoption of rules.

(f) **REPRESENTATION BY THE SENATE LEGAL COUNSEL.**—For the purpose of representation by the Senate Legal Counsel, the Office shall be deemed a committee, within the meaning of title VII of the Ethics in Government Act of 1978 (2 U.S.C. 288, et seq.).

SEC. 304. SENATE PROCEDURE FOR CONSIDERATION OF ALLEGED VIOLATIONS.

The Senate procedure for consideration of alleged violations consists of 4 steps as follows:

- (1) Step I, counseling, as set forth in section 305.
- (1) Step II, mediation, as set forth in section 306.
- (3) Step III, formal complaint and hearing by a hearing board, as set forth in section 307.
- (4) Step IV, review of a hearing board decision, as set forth in section 308 or 309.

SEC. 305. STEP I: COUNSELING.

(a) **IN GENERAL.**—A Senate employee alleging a violation may request counseling by the Office. The Office shall provide the employee with all relevant information with respect to the rights of the employee. A request for counseling shall be made not later than 180 days after the alleged violation forming the basis of the request for counseling occurred. No request for counseling may be made until 10 days after the first Director begins service pursuant to section 303(b)(4).

(b) **PERIOD OF COUNSELING.**—The period for counseling shall be 30 days unless the employee and the Office agree to reduce the period. The period shall begin on the date the request for counseling is received.

(c) **EMPLOYEES OF THE ARCHITECT OF THE CAPITOL AND CAPITOL POLICE.**—In the case of an employee of the Architect of the Capitol or an employee who is a member of the Capitol Police, the Director may refer the employee to the Architect of the Capitol or the Capitol Police Board for resolution

of the employee's complaint through the internal grievance procedures of the Architect of the Capitol or the Capitol Police Board for a specific period of time, which shall not count against the time available for counseling or mediation under this title.

SEC. 306. STEP II: MEDIATION.

(a) **IN GENERAL.**—Not later than 15 days after the end of the counseling period, the employee may file a request for mediation with the Office. Mediation may include the Office, the employee, and the employing office in a process involving meetings with the parties separately or jointly for the purpose of resolving the dispute between the employee and the employing office.

(b) **MEDIATION PERIOD.**—The mediation period shall be 30 days beginning on the date the request for mediation is received and may be extended for an additional 30 days at the discretion of the Office. The Office shall notify the employee and the head of the employing office when the mediation period has ended.

SEC. 307. STEP III: FORMAL COMPLAINT AND HEARING.

(a) **FORMAL COMPLAINT AND REQUEST FOR HEARING.**—Not later than 30 days after receipt by the employee of notice from the Office of the end of the mediation period, the Senate employee may file a formal complaint with the Office. No complaint may be filed unless the employee has made a timely request for counseling and has completed the procedures set forth in sections 305 and 306.

(b) **HEARING BOARD.**—A board of 3 independent hearing officers (referred to in this title as "hearing board"), who are not Senators or officers or employees of the Senate, chosen by the Director (one of whom shall be designated by the Director as the presiding hearing officer) shall be assigned to consider each complaint filed under this section. The Director shall appoint hearing officers after considering any candidates who are recommended to the Director by the Federal Mediation and

Conciliation Service, the Administrative Conference of the United States, or organizations composed primarily of individuals experienced in adjudicating or arbitrating personnel matters. A hearing board shall act by majority vote.

(c) **DISMISSAL OF FRIVOLOUS CLAIMS.**—Prior to a hearing under subsection (d), a hearing board may dismiss any claim that it finds to be frivolous.

(d) **HEARING.**—A hearing shall be conducted—

(1) in closed session on the record by a hearing board;

(2) no later than 30 days after filing of the complaint under subsection (a), except that the Office may, for good cause, extend up to an additional 60 days the time for conducting a hearing; and

(3) except as specifically provided in this title and to the greatest extent practicable, in accordance with the principles and procedures set forth in sections 554 through 557 of title 5, United States Code.

(e) **DISCOVERY.**—Reasonable prehearing discovery may be permitted at the discretion of the hearing board.

(f) **SUBPOENA.**—

(1) **AUTHORIZATION.**—A hearing board may authorize subpoenas, which shall be issued by the presiding hearing officer on behalf of the hearing board, for the attendance of witnesses at proceedings of the hearing board and for the production of correspondence, books, papers, documents, and other records.

(2) **OBJECTIONS.**—If a witness refuses, on the basis of relevance, privilege, or other objection, to testify in response to a question or to produce records in connection with the proceedings of a hearing board, the hearing board shall rule on the objection. At the request of the witness, the employee, or employing office, or on its own initiative, the hearing board may refer the objection to the Select Committee on Ethics for a ruling.

(3) **ENFORCEMENT.**—The Select Committee on Ethics may make to the Senate any recommendations by report or resolution, including recommendations for criminal or civil enforcement by or on behalf of the Office, which the Select

Committee on Ethics may consider appropriate with respect to—

(A) the failure or refusal of any person to appear in proceedings under this or to produce records in obedience to a subpoena or order of the hearing board; or

(B) the failure or refusal of any person to answer questions during his or her appearance as a witness in a proceeding under this section.

For purposes of section 1365 of title 28, United States Code, the Office shall be deemed to be a committee of the Senate.

(g) **DECISION.**—The hearing board shall issue a written decision as expeditiously as possible, but in no case more than 45 days after the conclusion of the hearing. The written decision shall be transmitted by the Office to the employee and the employing office. The decision shall state the issues raised by the complaint, describe the evidence in the record, and contain a determination as to whether a violation has occurred.

(h) **REMEDIES.**—If the hearing board determines that a violation has occurred, it shall order such remedies as would be appropriate if awarded under section 706(g) and (k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(g) and (k)), and may also order the award of such compensatory damages as would be appropriate if awarded under section 1977 and section 1977A (a) and (b)(2) of the Revised Statutes (42 U.S.C. 1981 and 1981A (a) and (b)(2)). In the case of a determination that a violation based on age has occurred, the hearing board shall order such remedies as would be appropriate if awarded under section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)). Any order requiring the payment of money must be approved by a Senate resolution reported by the Committee on Rules and Administration. The hearing board shall have no authority to award punitive damages.

(i) **PRECEDENT AND INTERPRETATIONS.**—Hearing boards shall be guided by judicial decisions under statutes referred to in section 302 and subsection (h) of this section, as well as the precedents developed by the Select Committee on Ethics under section 308, and other Senate precedents.

SEC. 308. REVIEW BY THE SELECT COMMITTEE ON ETHICS.

(a) **IN GENERAL.**—An employee or the head of an employing office may request that the Select Committee on Ethics (referred to in this section as the “Committee”), or such other entity as the Senate may designate, review a decision under section 307, including any decision following a remand under subsection (c), by filing a request for review with the Office not later than 10 days after the receipt of the decision of a hearing board. The Office, at the discretion of the Director, on its own initiative and for good cause, may file a request for review by the Committee of a decision of a hearing board not later than 5 days after the time for the employee or employing office to file a request for review has expired. The Office shall transmit a copy of any request for review to the Committee and notify the interested parties of the filing of the request for review.

(b) **REVIEW.**—Review under this section shall be based on the record of the hearing board. The Committee shall adopt and publish in the Congressional Record procedures for requests for review under this section.

(c) **REMAND.**—Within the time for a decision under subsection (d), the Committee may remand a decision no more than one time to the hearing board for the purpose of supplementing the record or for further consideration.

(d) **FINAL DECISION.**—

(1) **HEARING BOARD.**—If no timely request for review is filed under subsection (a), the Office shall enter as a final decision, the decision of the hearing board.

(2) **SELECT COMMITTEE ON ETHICS.**—

(A) If the Committee does not remand under subsection (c), it shall transmit a written final decision to the Office for entry in the records of the Office. The Committee shall transmit the decision not later than 60 calendar days during which the Senate is in session after the filing of a request for review under subsection (a). The Committee may extend for 15 calendar days during which the Senate is in session the period for transmission to the Office of a final decision.

(B) The decision of the hearing board shall be deemed to be a final decision, and entered in the records of the Office as a final decision, unless a majority of the Committee votes to reverse or remand the decision of the hearing board within the time for transmission to the Office of a final decision.

(C) The decision of the hearing board shall be deemed to be a final decision, and entered in the records of the Office as a final decision, if the Committee, in its discretion, decides not to review, pursuant to a request for review under subsection (a), a decision of the hearing board, and notifies the interested parties of such decision.

(3) **ENTRY OF A FINAL DECISION.**—The entry of a final decision in the records of the Office shall constitute a final decision for purposes of judicial review under section 309.

(e) **STATEMENT OF REASONS.**—Any decision of the Committee under subsection (c) or subsection (d)(2)(A) shall contain a written statement of the reasons for the Committee’s decision.

SEC. 309. JUDICIAL REVIEW.

(a) **IN GENERAL.**—Any Senate employee aggrieved by a final decision under section 308(d), or any Member of the Senate who would be required to reimburse the appropriate Federal account pursuant to the section entitled “Payments by the President or a Member of the Senate” and a final decision entered pursuant to section 308(d)(2)(B), may petition for review by the United States Court of Appeals for the Federal Circuit.

(b) **LAW APPLICABLE.**—Chapter 158 of title 28, United States Code, shall apply to a review under this section except that—

(1) with respect to section 2344 of title 28, United States Code, service of the petition shall be on the Senate Legal Counsel rather than on the Attorney General;

(2) the provisions of section 2348 of title 28, United States Code, on the authority of the Attorney General, shall not apply;

(3) the petition for review shall be filed not later than 90 days after the entry in the Office of a final decision under section 308(d);

(4) the Office shall be an "agency" as that term is used in chapter 158 of title 28, United States Code; and

(5) the Office shall be the respondent in any proceeding under this section.

(c) **STANDARD OF REVIEW.**—To the extent necessary to decision and when presented, the court shall decide all relevant questions of law and interpret constitutional and statutory provisions. The court shall set aside a final decision if it is determined that the decision was—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law;

(2) not made consistent with required procedures; or

(3) unsupported by substantial evidence.

In making the foregoing determinations, the court shall review the whole record, or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. The record on review shall include the record before the hearing board, the decision of the hearing board, and the decision, if any, of the Select Committee on Ethics.

(d) **ATTORNEY'S FEES.**—If an employee is the prevailing party in a proceeding under this section, attorney's fees may be allowed by the court in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C.2000e-5k)).

SEC. 310. RESOLUTION OF COMPLAINT.

If, after a formal complaint is filed under section 307, the employee and the head of the employing office resolve the issues involved, the employee may dismiss the complaint or the parties may enter into a written agreement, subject to the approval of the Director.

SEC. 311. COSTS OF ATTENDING HEARINGS.

Subject to the approval of the Director, an employee with respect to whom a hearing is held under this title may be reimbursed for actual and reasonable costs of attending proceedings under sections 307 and 308, consistent with Senate travel regulations. Senate Resolution 259, agreed to August 5, 1987 (100th Congress, 1st Session), shall apply to witnesses appearing in proceedings before a hearing board.

SEC. 312. PROHIBITION OF INTIMIDATION.

Any intimidation of, or reprisal against, any employee by any Member, officer, or employee of the Senate, or by the Architect of the Capitol, or anyone employed by the Architect of the Capitol, as the case may be, because of the exercise of a right under this title constitutes an unlawful employment practice, which may be remedied in the same manner under this title as is a violation.

SEC. 313. CONFIDENTIALITY.

(a) **COUNSELING.**—All counseling shall be strictly confidential except that the Office and the employee may agree to notify the head of the employing office of the allegations.

(b) **MEDIATION.**—All mediation shall be strictly confidential.

(c) **HEARINGS.**—Except as provided in subsection (d), the hearings, deliberations, and decisions of the hearing board and the Select Committee on Ethics shall be confidential.

(d) **FINAL DECISION OF SELECT COMMITTEE ON ETHICS.**—The final decision of the Select Committee on Ethics under section 308 shall be made public if the decision is in favor of the complaining Senate employee or if the decision reverses a decision of the hearing board which had been in favor of the employee. The Select Committee on Ethics may decide to release any other decision at its discretion. In the absence of a proceeding under section 308, a decision of the hearing board that is favorable to the employee shall be made public.

(e) **RELEASE OF RECORDS FOR JUDICIAL REVIEW.**—The records and decisions of hearing boards, and the decisions of the Select Committee on Ethics, may be made public if required for the purpose of judicial review under section 309.

SEC. 314. EXERCISE OF RULEMAKING POWER.

The provisions of this title, except for sections 309, 320, 321, and 322, are enacted by the Senate as an exercise of the rulemaking power of the Senate, with full recognition of the right of the Senate to change its rules, in the same manner, and to the same extent, as in the case of any other rule of the Senate. Notwithstanding any other provision of law, except as provided in section 309, enforcement and adjudication with respect to the discriminatory practices prohibited by section 302, and arising out of Senate employment, shall be within the exclusive jurisdiction of the United States Senate.

SEC. 315. TECHNICAL AND CONFORMING AMENDMENTS.

Section 509 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12209) is amended—

(1) in subsection (a)—

(A) by striking paragraphs (2) through (5);

(B) by redesignating paragraphs (6) and (7) as paragraphs (2) and (3), respectively; and

(C) in paragraph (3), as redesignated by subparagraph (B) of this paragraph—

(i) by striking “(2) and (6)(A)” and inserting “(2)(A)”, as redesignated by subparagraph (B) of this paragraph; and

(ii) by striking “(3), (4), (5), (6)(B), and (6)(C)” and inserting “(2)”; and

(2) in subsection (c)(2), by inserting “, except for the employees who are defined as Senate employees, in section 301(c)(1) of the Civil Rights Act of 1991” after “shall apply exclusively”.

SEC. 316. POLITICAL AFFILIATION AND PLACE OF RESIDENCE.

(a) **IN GENERAL.**—It shall not be a violation with respect to an employee described in subsection (b) to consider the—

(1) party affiliation;

(2) domicile; or

(3) political compatibility with the employing office, of such an employee with respect to employment decisions.

(b) **DEFINITION.**—For purposes of this section, the term “employee” means—

(1) an employee on the staff of the Senate leadership;

(2) an employee on the staff of a committee or subcommittee;

(3) an employee on the staff of a Member of the Senate;

(4) an officer or employee of the Senate elected by the Senate or appointed by a Member, other than those described in paragraphs (1) through (3); or

(5) an applicant for a position that is to be occupied by an individual described in paragraphs (1) through (4).

SEC. 317. OTHER REVIEW.

No Senate employee may commence a judicial proceeding to redress discriminatory practices prohibited under section 302 of this title, except as provided in this title.

SEC. 318. OTHER INSTRUMENTALITIES OF THE CONGRESS.

It is the sense of the Senate that legislation should be enacted to provide the same or comparable rights and remedies as are provided under this title to employees of instrumentalities of the Congress not provided with such rights and remedies.

SEC. 319. RULE XLII OF THE STANDING RULES OF THE SENATE.

(a) REAFFIRMATION.—The Senate reaffirms its commitment to Rule XLII of the Standing Rules of the Senate, which provides as follows:

“No Member, officer, or employee of the Senate shall, with respect to employment by the Senate or any office thereof—

“(a) fail or refuse to hire an individual;

“(b) discharge an individual; or

“(c) otherwise discriminate against an individual with respect to promotion, compensation, or terms, conditions, or privileges of employment

on the basis of such individual's race, color, religion, sex, national origin, age, or state of physical handicap.”.

(b) AUTHORITY TO DISCIPLINE.—Notwithstanding any provision of this title, including any provision authorizing orders for remedies to Senate employees to redress employment discrimination, the Select Committee on Ethics shall retain full power, in accordance with its authority under Senate Resolution 338, 88th Congress, as amended, with respect to disciplinary action against a Member, officer, or employee of the Senate for a violation of Rule XLII.

SEC. 320. COVERAGE OF PRESIDENTIAL APPOINTEES.

(a) IN GENERAL.—

(1) APPLICATION.—The rights, protections, and remedies provided pursuant to section 302 and 307(h) of this title shall apply with respect to employment of Presidential appointees.

(2) ENFORCEMENT BY ADMINISTRATIVE ACTION.—Any Presidential appointee may file a complaint alleging a violation, not later than 180 days after the occurrence of the alleged violation, with the Equal Employment Opportunity Commission, or such other entity as is designated by the President by Executive Order, which, in accordance with the principles and procedures set forth in sections 554 through 557 of title 5, United States Code, shall

determine whether a violation has occurred and shall set forth its determination in a final order. If the Equal Employment Opportunity Commission, or such other entity as is designated by the President pursuant to this section, determines that a violation has occurred, the final order shall also provide for appropriate relief.

(3) JUDICIAL REVIEW.—

(A) IN GENERAL.—Any party aggrieved by a final order under paragraph (2) may petition for review by the United States Court of Appeals for the Federal Circuit.

(B) LAW APPLICABLE.—Chapter 158 of title 28, United States Code, shall apply to a review under this section except that the Equal Employment Opportunity Commission or such other entity as the President may designate under paragraph (2) shall be an “agency” as that term is used in chapter 158 of title 28, United States Code.

(C) STANDARD OF REVIEW.—To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law and interpret constitutional and statutory provisions. The court shall set aside a final order under paragraph (2) if it is determined that the order was—

(i) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law;

(ii) not made consistent with required procedures; or

(iii) unsupported by substantial evidence.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(D) ATTORNEY'S FEES.—If the presidential appointee is the prevailing party in a proceeding under this section, attorney's fees may be allowed by the court in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

(b) PREIDENTIAL APPOINTEE.—For purposes of this section, the term “Presidential appointee” means any officer or employee, or an applicant seeking to become an officer or

employee, in any unit of the Executive Branch, including the Executive Office of the President, whether appointed by the President or by any other appointing authority in the Executive Branch, who is not already entitled to bring an action under any of the statutes referred to in section 302 but does not include any individual—

- (1) whose appointment is made by and with the advice and consent of the Senate;
- (2) who is appointed to an advisory committee, as defined in section 3(2) of the Federal Advisory Committee Act (5 U.S.C. App.); or
- (3) who is a member of the uniformed services.

SEC. 321. COVERAGE OF PREVIOUSLY EXEMPT STATE EMPLOYEES.

(a) APPLICATION.—The rights, protections, and remedies provided pursuant to section 302 and 307(h) of this title shall apply with respect to employment of any individual chosen or appointed, by a person elected to public office in any State or political subdivision of any State by the qualified voters thereof—

- (1) to be a member of the elected official's personal staff;
 - (2) to serve the elected official on the policymaking level;
- or
- (3) to serve the elected official as an immediate advisor with respect to the exercise of the constitutional or legal powers of the office.

(b) ENFORCEMENT BY ADMINISTRATIVE ACTION.—

(1) IN GENERAL.—Any individual referred to in subsection (a) may file a complaint alleging a violation, not later than 180 days after the occurrence of the alleged violation, with the Equal Employment Opportunity Commission, which, in accordance with the principles and procedures set forth in sections 554 through 557 of title 5, United States Code, shall determine whether a violation has occurred and shall set forth its determination in a final order. If the Equal Employment Opportunity Commission determines that a violation has occurred, the final order shall also provide for appropriate relief.

(2) REFERRAL TO STATE AND LOCAL AUTHORITIES.—

(A) APPLICATION.—Section 706(d) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5d)) shall apply with respect to any proceeding under this section.

(B) DEFINITION.—For purposes of the application described in subparagraph (A), the term “any charge filed by a member of the Commission alleging an unlawful employment practice” means a complaint filed under this section.

(c) JUDICIAL REVIEW.—Any party aggrieved by a final order under subsection (b) may obtain a review of such order under chapter 158 of title 28, United States Code. For the purpose of this review, the Equal Employment Opportunity Commission shall be an “agency” as that term is used in chapter 158 of title 28, United States Code.

(d) STANDARD OF REVIEW.—To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law and interpret constitutional and statutory provisions. The court shall set aside a final order under subsection (b) if it is determined that the order was—

- (1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law;
- (2) not made consistent with required procedures; or
- (3) unsupported by substantial evidence.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(e) ATTORNEY'S FEES.—If the individual referred to in subsection (a) is the prevailing party in a proceeding under this subsection, attorney's fees may be allowed by the court in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5k)).

SEC. 322. SEVERABILITY.

Notwithstanding section 401 of this Act, if any provision of section 309 or 320(a)(3) is invalidated, both sections 309 and 320(a)(3) shall have no force and effect.

SEC. 323. PAYMENTS BY THE PRESIDENT OR A MEMBER OF THE SENATE.

The President or a Member of the Senate shall reimburse the appropriate Federal account for any payment made on his or her behalf out of such account for a violation committed under the provisions of this title by the President or Member of the Senate not later than 60 days after the payment is made.

SEC. 324. REPORTS OF SENATE COMMITTEES.

(a) Each report accompanying a bill or joint resolution of a public character reported by any committee of the Senate (except the Committee on Appropriations and the Committee on the Budget) shall contain a listing of the provisions of the bill or joint resolution that apply to Congress and an evaluation of the impact of such provisions on Congress.

(b) The provisions of this section are enacted by the Senate as an exercise of the rulemaking power of the Senate, with full recognition of the right of the Senate to change its rules, in the same manner, and to the same extent, as in the case of any other rule of the Senate.

SEC. 325. INTERVENTION AND EXPEDITED REVIEW OF CERTAIN APPEALS.

(a) **INTERVENTION.**—Because of the constitutional issues that may be raised by section 309 and section 320, any Member of the Senate may intervene as a matter of right in any proceeding under section 309 for the sole purpose of determining the constitutionality of such section.

(b) **THRESHOLD MATTER.**—In any proceeding under section 309 or section 320, the United States Court of Appeals for the Federal Circuit shall determine any issue presented concerning the constitutionality of such section as a threshold matter.

(c) **APPEAL.**—

(1) **IN GENERAL.**—An appeal may be taken directly to the Supreme Court of the United States from any interlocutory or final judgment, decree, or order issued by the

United States Court of Appeals for the Federal Circuit ruling upon the constitutionality of section 309 or 320.

(2) **JURISDICTION.**—The Supreme Court shall, if it has not previously ruled on the question, accept jurisdiction over the appeal referred to in paragraph (1), advance the appeal on the docket and expedite the appeal to the greatest extent possible.

TITLE IV—GENERAL PROVISIONS

SEC. 401. SEVERABILITY.

If any provision of this Act, or an amendment made by this Act, or the application of such provision to any person or circumstances is held to be invalid, the remainder of this Act and the amendments made by this Act, and the application of such provision to other persons and circumstances, shall not be affected.

SEC. 402. EFFECTIVE DATE.

(a) **IN GENERAL.**—Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment.

(b) **CERTAIN DISPARATE IMPACT CASES.**—Notwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983.

TITLE V—CIVIL WAR SITES ADVISORY COMMISSION

SEC. 501. CIVIL WAR SITES ADVISORY COMMISSION.

Section 1205 of Public Law 101-628 is amended in subsection (a) by—

(1) striking "Three" in paragraph (4) and inserting "Four" in lieu thereof; and

(2) striking "Three" in paragraph (5) and inserting "Four" in lieu thereof.

Approved November 21, 1991.

APPENDIX E

DECISIONS ON THE APPLICABILITY OF THE CIVIL RIGHTS ACT OF 1991 TO PENDING CASES

**DECISIONS APPLYING THE ACT
TO PENDING CASES¹**

Ninth Circuit—Court of Appeals

Davis v. City and County of San Francisco, No. 91-15113, 1992 U.S. App. LEXIS 24836 (9th Cir. Oct. 6, 1992) (Fletcher, J.) (the Act applies to pending cases).

First Circuit—District Courts

Marrero-Rivera v. Dept. of Justice of the Commonwealth of Puerto Rico, No. 92-1172, 1992 WL 200435 (D.P.R. July 23, 1992) (Fuste, J.) (§ 102 of the Act applies to cases involving pre-Act conduct filed after the effective date of the Act).

Second Circuit—District Courts

Croce v. VIP Real Estate, Inc., 786 F. Supp. 1141 (E.D.N.Y. Mar. 21, 1992) (Spatt, J.) (§ 102 of the Act applies to pending cases).

Jackson v. Bankers Trust Co., No. 88 CIV. 4786 (JSM), 1992 U.S. Dist. LEXIS 6290 (S.D.N.Y. May 4, 1992) (Martin, J.) (§§ 102, 113 of the Act apply to pending cases).

Gardner v. MCI Telecommunications Corp., 792 F. Supp. 377 (S.D.N.Y. June 11, 1992) (Sprizzo, J.) (§ 102(c) of the Act applies to pending cases).

Wisdom v. Intrepid Sea-Air Museum, No. 91 CIV. 4439 (RPP), 1992 U.S. Dist. LEXIS 9424 (S.D.N.Y. June 26, 1992) (Patterson, J.) (§ 102 of the Act applies to pending cases).

Postema v. National League of Professional Baseball Clubs, No. 91 CIV. 8507 (RPP), 1992 WL 196656 (S.D.N.Y. July 17, 1992) (Patterson, J.) (§ 102 of the Act applies to pending cases).

¹ The decisions listed in this appendix are all those decisions that our research has discovered to date. The list, however, is by no means exhaustive.

Bridges v. Eastman Kodak Co., No. 91 CIV. 7985 (RLC), 1992 U.S. Dist. LEXIS 13083 (S.D.N.Y. Sept. 1, 1992) (Carter, J.) (§ 102 of the Act applies to pending cases).

Third Circuit—District Courts

Thakkar v. Provident Nat'l Bank, No. 90-3907, 1991 U.S. Dist. LEXIS 18753 (E.D. Pa. Dec. 17, 1991) (Waldman, J.) (the Act applies to pending cases).

Wittman v. New England Mutual Life Ins. Co., No. 90-1688 (W.D. Pa. Feb. 10, 1992) (Diamond, J.) (the Act applies to pending cases).

Sample v. Keystone Carbon Co., 786 F. Supp. 527 (W.D. Pa. Mar. 4, 1992) (Cahill, J.) (§§ 102, 107 of the Act apply to pending cases).

Klaus v. Duquesne Light Co., No. 90-1149, 1992 WL 189390 (W.D. Pa. Mar. 11, 1992) (Lancaster, J.) (§§ 101, 102 of the Act apply to pending cases).

Greenwood v. M.P.W. Stone, No. 91-1795, 1992 WL 163601 (W.D. Pa. Mar. 23, 1992) (Ziegler, J.) (§ 102 of the Act applies to pending cases).

Savko v. Port Auth. of Allegheny County, No. 87-2390, 1992 U.S. Dist. LEXIS 9201 (W.D. Pa. May 22, 1992) (Lewis, J.) (§ 102 of the Act applies to pending cases).

Tyler v. Commonwealth of Pennsylvania, Dep't. of Revenue, 793 F. Supp. 98 (M.D. Pa. June 4, 1992) (McClure, J.) (§ 102 of the Act applies to pending cases).

Kodenkandeth v. American Tel. & Tel. Co., No. 91-940 (W.D. Pa. July 2, 1992) (Bloch, J.) (§ 101 of the Act does not apply to pending cases).

Fourth Circuit—District Courts

Leach v. Northern Telecom, Inc., 790 F. Supp. 572 (E.D.N.C. Jan. 17, 1992) (Britt, J.) (the Act applies to pending cases).

Holmes v. Carolina Power & Light Co., No. 91-508-CIV-S-F, 1992 WL 82485 (E.D.N.C. Feb. 13, 1992) (McCotter, J.) (§ 102(c) of the Act applies to pending cases).

Jaekel v. Equifax Mktg. Decision Sys., No. 92-607-A, 1992 U.S. Dist. LEXIS 9489 (E.D. Va. June 26, 1992) (Ellis, J.) (§ 102 of the Act applies to pending cases).

Fifth Circuit—District Courts

LaCour v. Harris, No. H-89-1532, 1991 U.S. Dist. LEXIS 19223 (S.D. Tex. Dec. 6, 1991) (Hoyt, J.) (§ 102(c) of the Act applies to pending cases), *aff'd without opinion*, 1992 U.S. App. LEXIS 27350 (5th Cir. Sept. 25, 1992).

Equal Employment Opportunity Comm'n v. Fred's Stores of Mississippi, Inc., No. GC90-294-D-O, 1992 U.S. Dist. LEXIS 8260 (N.D. Miss. Mar. 20, 1992) (Orlansky, J.) (§ 102 of the Act applies to pending cases).

Tarver v. Functional Living, Inc., No. A-92-CA-052, 1992 U.S. Dist. LEXIS 8518 (W.D. Tex. June 8, 1992) (Nowlin, J.) (§ 102 of the Act applies to pending cases).

McConnell v. Thomson Newspapers, Inc., No. 2:92CV22, 1992 U.S. Dist. LEXIS 12133 (E.D. Tex. Aug. 11, 1992) (Justice, J.) (§ 115 of the Act applies to cases involving pre-Act conduct filed after the effective date of the Act).

Sixth Circuit—District Courts

Andrade v. Crawford and Co., 792 F. Supp. 543 (N.D. Ohio May 5, 1992) (Aldrich, J.) (§ 101 of the Act applies to pending cases).

Keys v. U.S. Welding Fabricating and Mfg., Inc., No. 1:91CV0113, 1992 U.S. Dist. LEXIS 13197 (N.D. Ohio Aug. 26, 1992) (Aldrich, J.) (§ 101 of the Act applies to pending cases).

Seventh Circuit—District Courts

Mojica v. Gannett Co., Inc., 779 F. Supp. 94 (N.D. Ill. Nov. 27, 1991) (Hart, J.) (§ 102 of the Act applies to pending cases).

Equal Employment Opportunity Comm'n v. Elgin Teachers Ass'n, No. 86-C-6775, 1991 U.S. Dist. LEXIS 18527 (N.D. Ill. Dec. 12, 1991) (Alesia, J.) (§ 115 of the Act applies to pending cases).

Cary v. Chicago Housing Auth., No. 87-C-6998, 1991 U.S. Dist. LEXIS 18543 (N.D. Ill. Dec. 13, 1991) (Nordberg, J.) (§ 113 of the Act does apply to pending cases).

Saltarikos v. Charter Mfg. Co., 782 F. Supp. 420 (E.D. Wis. Jan. 8, 1992) (Evans, J.) (§ 101 of the Act applies to pending cases).

Guess v. City of Portage, No. H90-276, 1992 WL 8722 (N.D. Ind. Jan. 14, 1992) (Rodovich, J.) (§ 102 of the Act applies to pending cases).

Bristow v. Drake St., Inc., No. 87-C-4412, 1992 U.S. Dist. LEXIS 499 (N.D. Ill. Jan. 17, 1992) (Zagel, J.) (§§ 102, 107 of the Act apply to pending cases).

Graham v. Bodine Elec. Co., 782 F. Supp. 74 (N.D. Ill. Jan. 23, 1992) (Leinenweber, J.) (the Act applies to pending cases).

Hrabak v. Marquip, Inc., No. 91-C-9442, 1992 WL 189392 (W.D. Wis. Feb. 11, 1992) (Shabaz, J.) (§ 102 of the Act applies to pending cases).

Gillespie v. Norwest Corp., Nos. 85-C-1318, 85-C-1393, 1992 U.S. Dist. LEXIS 5230 (E.D. Wis. Feb. 14, 1992) (Stadtmueller, J.) (the Act applies to pending cases).

Poston v. Reliable Drugstores, Inc., 783 F. Supp. 1166 (S.D. Ind. Feb. 19, 1992) (Dillin, J.) (§ 101 of the Act applies to pending cases).

Aldana v. Raphael Contractors, Inc., 785 F. Supp. 1328 (N.D. Ind. Feb. 26, 1992) (Lozano, J.) (§ 102 of the Act applies to pending cases).

Boyer v. Kimberly Serv., Inc., No. 91-00379, 1992 U.S. Dist. LEXIS 8612 (S.D. Ill. Feb. 28, 1992) (Stiehl, J.) (§ 102 of the Act applies to pending cases).

Manning v. Moore Business Forms, No. 91-C-707, 1992 WL 160604 (W.D. Wis. Mar. 31, 1992) (Shabaz, J.) (§ 102 of the Act applies to pending cases).

Werntz v. Civil City of South Bend, Indiana, No. 591-305M (N.D. Ind. Apr. 7, 1992) (Miller, J.) (§ 102 of the Act applies to pending cases).

Lute v. Consolidated Freightways, Inc., 789 F. Supp. 964 (N.D. Ind. Apr. 27, 1992) (Miller, J.) (§ 102 of the Act applies to pending cases).

Emery v. Chicago Transit Auth., No. 91-C-7091, 1992 U.S. Dist. LEXIS 7222 (N.D. Ill. May 13, 1992) (Kocoras, J.) (§ 102 of the Act applies to pending cases).

Brown v. Amoco Oil Co., 793 F. Supp. 846 (N.D. Ind. May 15, 1992) (Moody, J.) (§ 102 of the Act applies to pending cases).

Lofton v. Brown & Williamson Tobacco Corp., No. 90-C-5796, 1992 U.S. Dist. LEXIS 7517 (N.D. Ill. May 28, 1992) (Guzman, J.) (§ 102 of the Act applies to pending cases).

Carpenter v. Ford Motor Co., No. 90-C-5822, 1992 U.S. Dist. LEXIS 8165 (N.D. Ill. June 9, 1992) (Kocoras, J.) (§ 102 of the Act applies to pending cases).

Basilick v. Cole, No. 91-C-5156, 1992 WL 166950 (N.D. Ill. July 8, 1992) (Moran, J.) (§ 102 of the Act applies to pending cases).

Eighth Circuit—District Courts

Davis v. Tri-State Mack Distributions, Inc., No. LR-C-89-912, 1991 U.S. Dist. LEXIS 19380 (E.D. Ark. Dec. 16, 1991) (Roy, J.) (§ 113 of the Act does apply to pending cases).

Griddine v. Dillard Dep't Stores, Inc., No. 89-0333-CV-W-6, 1992 U.S. Dist. LEXIS 3586 (W.D. Mo. Mar. 16, 1992) (Sachs, J.) (§ 113 of the Act does apply to pending cases).

Sudtelgle v. Sessions, 789 F. Supp. 312 (W.D. Mo. Apr. 21, 1992) (Sachs, J.) (§ 113 of the Act does apply to pending cases).

Ninth Circuit—District Courts

Stender v. Lucky Stores, Inc., 780 F. Supp. 1302 (N.D. Cal. Jan. 7, 1992) (Patel, J.) (the Act applies to pending cases).

Sanders v. Culinary Workers Union Local No. 226, 783 F. Supp. 531 (D. Nev. Feb. 11, 1992) (Pro, J.) (the Act applies to pending cases).

United States v. Department of Mental Health, 785 F. Supp. 846 (E.D. Cal. Mar. 2, 1992) (Beck, J.) (§ 102 of the Act applies to pending cases).

Fernando v. Hotel Nikko Saipan, Inc., No. 91-0013, 1992 U.S. Dist. LEXIS 10228 (D. N. Mariana I. Mar. 7, 1992) (Munson, J.) (the Act applies to pending cases).

Lee v. Sullivan, 787 F. Supp. 921 (N.D. Cal. Mar. 26, 1992) (Brazil, J.) (§ 102 of the Act applies to pending cases).

Bierdeman v. Shearson Lehman Hutton, Inc., No. C-89-4473, 1992 U.S. Dist. LEXIS 13366 (N.D. Cal. May 28, 1992) (Peckham, J.) (§§ 101, 102 of the Act apply to pending cases), *rev'd on other grounds*, 963 F.2d 378, 1992 U.S. App. LEXIS 13271 (9th Cir.), *cert. denied*, 61 U.S.L.W. 3284 (1992).

Ashburne v. Stonepine Resort Co., Inc., No. C-91-20191-WAI (N.D. Cal. June 1, 1992) (Ingram, J.) (§ 101 of the Act applies to pending cases).

Coulter v. Newmont Gold Co., No. CV-N-91-508, 1992 WL 231011 (D. Nev. June 4, 1992) (Reed, J.) (§ 102 of the Act applies to pending cases).

Kent v. Howard, No. CIV. 92-280-R(M), 1992 WL 207653 (S.D. Cal. Aug. 24, 1992) (Rhoades, J.) (§ 102 of the Act applies to pending cases).

Tenth Circuit—District Courts

Great Am. Tool and Mfg. Co. v. Adolph Coors Co., Inc., 780 F. Supp. 1354 (D. Colo. Jan. 16, 1992) (Baback, J.) (§ 101 of the Act applies to cases involving pre-Act conduct filed after the effective date of the Act).

Pflueger v. Effective Secretarial Serv., Inc., No. CIV-91-182-C (W.D. Okla. Mar. 6, 1992) (Cauthron, J.) (the Act applies to pending cases).

Bratcher v. Bray-Doyle Indep. Sch. Dist. No. 42 of Stephens County, Oklahoma, No. CIV-91-808-A (N.D. Okla. Feb. 12, 1992) (Alley, J.) (the Act applies to pending cases).

Smith v. Colorado Interstate Gas Co., 794 F. Supp. 1035 (D. Colo. May 22, 1992) (Babcock, J.) (§ 113 of the Act does apply to pending cases).

Eleventh Circuit—District Courts

King v. Shelby Medical Ctr., 779 F. Supp. 157 (N.D. Ala. Dec. 18, 1991) (Acker, J.) (§§ 101, 102 of the Act apply to pending cases).

Goldsmith v. City of Atmore, 782 F. Supp. 106 (S.D. Ala. Jan. 15, 1992) (Butler, J.) (§§ 101, 102 of the Act apply to pending cases).

Long v. Carr, 784 F. Supp. 887 (N.D. Ga. Jan. 31, 1992) (Freeman, J.) (§ 102 of the Act applies to pending cases).

Joyner v. Monier Roof Tile, Inc., 784 F. Supp. 872 (S.D. Fla. Feb. 4, 1992) (Paine, J.) (§§ 102, 107 of the Act apply to pending cases).

Watkins v. Bessemer State Technical College, 782 F. Supp. 581 (N.D. Ala. Feb. 6, 1992) (Acker, J.) (§§ 101, 102 of the Act apply to pending cases).

Carmichael v. Fowler, No. 1:88-CV-969, 1992 WL 120353 (N.D. Ga. Mar. 11, 1992) (Ward, J.) (§ 102 of the Act applies to pending cases).

Martin v. Federal Express Corp., No. 4:90-CV-88-HCM (N.D. Ga. Mar. 27, 1992) (Murphy, J.) (§ 102 of the Act applies to pending cases).

Gilbert v. Milliken & Co., 794 F. Supp. 376 (N.D. Ga. Mar. 30, 1992) (Tidwell, J.) (§ 102 of the Act applies to pending cases).

Sussman v. Saxon, No. 91-776-CIV-7-17C, 1992 U.S. Dist. LEXIS 7755 (M.D. Fla. May 29, 1992) (Kovachevich, J.) (§ 102 of the Act applies to pending cases).

Assily v. Tampa Gen. Hosp., 791 F. Supp. 862 (M.D. Fla. May 29, 1992) (Kovachevich, J.) (§ 102 of the Act applies to pending cases).

Desai v. Siemens Medical Systems, Inc., 792 F. Supp. 1275 (M.D. Fla. May 29, 1992) (Kovachevich, J.) (§ 102 of the Act applies to pending cases).

Langston v. Daniels, Micheals & Assoc., No. CV 91-P-2063-5, 1992 WL 198414 (N.D. Ala. June 4, 1992) (Pointer, J.) (§ 102 of the Act applies to pending cases).

D.C. Circuit—District Courts

Robinson v. Davis Memorial Goodwill Indus., 790 F. Supp. 325 (D.D.C. Apr. 21, 1992) (Sporkin, J.) (§ 102 of the Act applies to pending cases).

DECISIONS NOT APPLYING THE ACT TO PENDING CASES

Fifth Circuit—Court of Appeals

Johnson v. Uncle Ben's, Inc., 965 F.2d 1363 (5th Cir. July 1, 1992) (Higginbottom, J.) (§ 101 of the Act does not apply to pending cases).

Landgraf v. USI Film Products, 968 F.2d 427 (5th Cir. July 30, 1992) (Higginbottom, J.) (§ 102 of the Act does not apply to pending cases).

Rowe v. Sullivan, 967 F.2d 186 (5th Cir. Aug. 5, 1992) (Garza, J.) (§§ 101, 114 do not apply to pending cases).

Wilson v. Belmont Homes, Inc., 970 F.2d 53 (5th Cir. Aug. 28, 1992) (Smith, J.) (§ 102 of the Act does not apply to pending cases).

Valdez v. San Antonio Chamber of Commerce, Nos. 91-5713, 91-5820, 1992 WL 236161 (5th Cir. Sept. 25, 1992) (DeMoss, J.) (§§ 101, 102 of the Act do not apply to pending cases).

Wilson v. UT Health Ctr., No. 91-4618, 1992 WL 229549 (5th Cir. Oct. 6, 1992) (Reavley, J.) (§ 102 of the Act does not apply to pending cases).

Sixth Circuit—Court of Appeals

Vogel v. City of Cincinnati, 959 F.2d 594 (6th Cir. Mar. 13, 1992) (Timbers, J.) (the Act does not apply to pending cases where it affects the substantive rights and liabilities of the parties), *cert. denied*, 60 U.S.L.W. 3881 (Oct. 5, 1992).

Brownlee v. Chrysler Motors Corp., No. 91-1587, 1992 U.S. App. LEXIS 14669 (6th Cir. June 16, 1992) (the Act does not apply to pending cases).

Hines v. Vanderbilt Univ. Medical Ctr., No. 91-5418, 1992 U.S. App. LEXIS 14689 (6th Cir. June 17, 1992) (the Act does not apply to pending cases).

Douthit v. Keebler Co., 968 F.2d 1214 (6th Cir. June 24, 1992) (text in WESTLAW) (the Act does not apply to pending cases).

Paglio v. Chagrin Valley Hunt Club Corp., 966 F.2d 1453 (6th Cir. June 25, 1992) (text in WESTLAW) (the Act does not apply to pending cases).

Harvis v. Roadway Express, Inc., 973 F.2d 490 (6th Cir. Aug. 24, 1992) (Boggs, J.) (§ 101 of the Act does not apply to pending cases).

Kuhn v. Island Creek Coal Co., No. 91-6325, 1992 WL 207942 (6th Cir. Aug. 27, 1992) (*per curiam*) (text in WESTLAW) (the Act does not apply to pending cases).

Roland v. Johnson, No. 91-1460, 1992 WL 214441 (6th Cir. Sept. 4, 1992) (*per curiam*) (text in WESTLAW) (§ 113 does not apply to pending cases).

Holt v. Michigan Dep't of Corrections, No. 91-2034, 1992 WL 217067 (6th Cir. Sept. 11, 1992) (Merritt, J.) (the Act does not apply to pending cases).

Seventh Circuit—Court of Appeals

Mozee v. American Commercial Marine Serv. Co., 963 F.2d 929 (7th Cir. May 7, 1992) (Wood, J.) (§§ 101, 102, 104, 105 not applicable to case pending on appeal), *cert. denied*, 61 U.S.L.W. 3150 (Oct. 5, 1992).

Malhotra v. Cotter & Co., No. 90-3862, 1992 U.S. App. LEXIS 13007 (7th Cir. May 28, 1992) (§ 101 of the Act does not apply to pending cases).

Luddington v. Indiana Bell Tel. Co., 966 F.2d 225 (7th Cir. June 15, 1992) (Posner, J.) (§ 101 of the Act does not apply to pending cases).

Rush v. McDonald's Corp., 966 F.2d 1104 (7th Cir. June 29, 1992) (Ripple, J.) (§ 101 of the Act does not apply to pending cases).

Artis v. Hitachi Zosen Clearing, Inc., 967 F.2d 1132 (7th Cir. July 9, 1992) (Cudahy, J.) (§ 101 of the Act does not apply to pending cases).

Taylor v. Western and Southern Life Ins. Co., 966 F.2d 1188 (7th Cir. July 13, 1992) (Ripple, J.) (§ 101 of the Act does not apply to pending cases).

Banas v. American Airlines, 969 F.2d 477 (7th Cir. July 29, 1992) (Cummings, J.) (§ 112 of the Act does not apply to pending cases).

Eighth Circuit—Court of Appeals

Fray v. Omaha World Herald Co., 960 F.2d 1370 (8th Cir. Apr. 3, 1992) (Loken, J.) (§ 101 of the Act does not apply to pending cases).

Valdez v. Mercy Hospital, 961 F.2d 1401 (8th Cir. Apr. 27, 1992) (Bowman, J.) (§ 101 of the Act does not apply to pending cases).

Huey v. Sullivan, 971 F.2d 1362 (8th Cir. July 30, 1992) (Magill, J.) (§§ 113, 114 of the Act do not apply to pending cases).

Parton v. GTE North, Inc., 971 F.2d 150 (8th Cir. July 31, 1992) (Bowman, J.) (§ 101 of the Act does not apply to pending cases).

Eleventh Circuit—Court of Appeals

Baynes v. AT&T, Inc. and Gasaway, No. 91-8488, 1992 WL 296716 (11th Cir. Oct. 20, 1992) (*per curiam*) (§§ 101, 102 of the Act do not apply to pending cases).

D.C. Circuit—Court of Appeals

Gersman v. Group Health Ass'n, Inc., No. 89-5482, 1992 WL 220163 (D.C. Cir. Sept. 15, 1992) (Sentelle, J.) (§ 101 of the Act does not apply to pending cases).

First Circuit—District Courts

Virapen v. Eli Lilly, S.A., 793 F. Supp. 36 (D. Puerto Rico June 25, 1992) (Perez-Gimenez, J.) (the Act does not apply to pending cases).

Second Circuit—District Courts

Sorluccho v. New York City Police Dep't, 780 F. Supp. 202 (N.D.N.Y. Jan. 7, 1992) (McKassey, J.) (§ 102 of the Act does

not apply to pending cases), *rev'd on other grounds*, 971 F.2d 864 (July 28, 1992).

McLaughlin v. State of New York, Governor's Office of Employee Relations, 784 F. Supp. 961 (N.D.N.Y. Mar. 5, 1992) (McCurn, J.) (§ 102 of the Act does not apply to pending cases).

Reynolds v. Frank, 786 F. Supp. 168 (D. Conn. Mar. 18, 1992) (Dorsey, J.) (§ 102 of the Act does not apply to pending cases).

Sava v. General Elec. Co., 789 F. Supp. 78 (D. Conn. Apr. 10, 1992) (Zampano, J.) (§ 102 of the Act does not apply to pending cases).

Smith v. Petra Cablevision Corp., 793 F. Supp. 417 (E.D.N.Y. May 20, 1992) (Amon, J.) (the Act does not apply to pending cases).

Boss v. Board of Educ., Union Free Sch. Dist. #6, No. CV 92-0399, 1992 WL 160398 (E.D.N.Y. July 6, 1992) (§§ 101, 102 of the Act do not apply to pending cases).

Kelber v. Forest Electric Corp., No. 90 CIV. 3790 (LJF), 1992 WL 189247 (S.D.N.Y. July 7, 1992) (Freeh, J.) (the Act does not apply to pending cases).

Lippa v. General Motors, 796 F. Supp. 81 (N.D.N.Y. Aug. 12, 1992) (Telesca, J.) (the Act does not apply to pending cases).

Guntur v. Union College, No. 88 CIV. 1080, 1992 U.S. Dist. LEXIS 12499 (N.D.N.Y. Aug. 19, 1992) (McCurn, J.) (§ 102 of the Act does not apply to pending cases).

Jorge v. New York City Police Dep't, No. 91 CIV. 0798 (LJF), 1992 U.S. Dist. LEXIS 13116 (S.D.N.Y. Sept. 1, 1992) (Freeh, J.) (the Act does not apply to pending cases).

McGeary v. Connecticut Mutual Life Ins. Co., Nos. 2:91CV 1007 (PCD), 2:90CV583 (PCD), 2:90CV59(PCD), 1992 WL 202408 (D. Conn. Mar. 26, 1992) (Dorsey, J.) (the Act does not apply to pending cases).

Kemp v. Flygt Corp., 791 F. Supp. 48 (D. Conn. May 20, 1992) (Eginton, J.) (the Act does not apply to pending cases).

Butts v. City of New York, Dep't of Housing Preservation and Dev., No. 91CIV.5325(LJF), 1992 WL 170681 (S.D.N.Y. July 7, 1992) (Freeh, J.) (the Act does not apply to pending cases).

Stout v. International Business Machs. Corp., No. 91 CIV. 4983(GLG), 1992 WL 166846 (S.D.N.Y. July 16, 1992) (Goettel, J.) (§§ 101, 102 of the Act do not apply to pending cases).

Gilmore v. Local 295, Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of Am., No. 91 CIV. 1860 (GLG), 1992 WL 188300 (S.D.N.Y. Aug. 6, 1992) (Goettel, J.) (§§ 101, 102 of the Act do not apply to pending cases).

Davis v. Boykin Management Co., No. 91-CV-359E, 1992 U.S. Dist. LEXIS 15305 (W.D.N.Y. Aug. 27, 1992) (Elfvin, J.) (§ 102 of the Act does not apply to pending cases).

Third Circuit—District Courts

Alexandre v. Amp, Inc., No. 1:CV-90-0868, 1991 WL 322947 (M.D. Pa. Dec. 5, 1991) (Caldwell, J.) (the Act does not apply to pending cases).

Sinnovich v. Port Authority of Allegheny, No. 89-1524, 1991 WL 348046 (W.D. Pa. Dec. 31, 1991) (Standish, J.) (the Act does not apply to pending cases).

Futch v. Stone, 782 F. Supp. 284 (M.D. Pa. Jan. 13, 1992) (McClure, J.) (§ 102 of the Act does not apply to pending cases).

Tyree v. Riley, 783 F. Supp. 877 (D.N.J. Feb. 7, 1992) (Lechner, J.) (§ 102 of the Act does not apply to pending cases).

Kimble v. DPCE, Inc., 784 F. Supp. 250 (E.D. Pa. Feb. 13, 1992) (Kelly, J.) (the Act does not apply to pending cases).

Thomas v. Frank, 791 F. Supp. 470 (D.N.J. Feb. 13, 1992) (Debevoise, J.) (§ 102 of the Act does not apply to pending cases).

Thompson v. Johnson & Johnson Management Info. Ctr., 783 F. Supp. 893 (D.N.J. Feb. 18, 1992) (Fisher, J.) (the Act does not apply to pending cases).

Long v. Hershey Chocolate, USA, No. 1:CV-91-1689, 1992 U.S. Dist. LEXIS 6583 (M.D. Pa. May 1, 1992) (Rambo, J.) (the Act does not apply to pending cases).

Haynes v. Glen Mills Sch., No. 91-6905, 1992 U.S. Dist. LEXIS 6464 (E.D. Pa. May 5, 1992) (Kelly, J.) (the Act does not apply to pending cases).

Crumley v. Delaware State College, No. 92-25, 1992 U.S. Dist. LEXIS 8982 (D. Del. June 11, 1992) (Schwartz, J.) (§§ 102, 113 of the Act do not apply to pending cases).

Konstantopoulos v. Westvaco Corp., No. 90-146, 1992 U.S. Dist. LEXIS 9466 (D. Del. June 19, 1992) (Wright, J.) (§§ 102, 113 of the Act do not apply to pending cases).

Neibauer v. Philadelphia College of Pharmacy and Science, No. 92-CV-1993, 1992 U.S. Dist. LEXIS 9702 (E.D. Pa. June 19, 1992) (Weiner, J.) (§ 102 of the Act does not apply to pending cases).

Thompson v. Prudential Ins. Co. of Am., 795 F. Supp. 1337 (D.N.J. June 23, 1992) (Barry, J.) (the Act does not apply to pending cases).

Aiken v. Bucks Ass'n for Retarded Citizens, Inc., No. Civ. A. 91-2672, 1992 WL 186582 (E.D. Pa. July 14, 1992) (Reed, J.) (§§ 101, 102 of the Act do not apply to pending cases).

Core v. Guest Quarters Hotel/Beacon Hotel Corp., No. 92-2033, 1992 WL 189405 (E.D. Pa. July 30, 1992) (Bartle, J.) (§ 101 of the Act does not apply to cases involving pre-Act conduct filed after the effective date of the Act).

Heist v. United States Postal Serv., No. 91-3583, 1992 WL 189394 (E.D. Pa. Aug. 3, 1992) (Troutman, J.) (the Act does not apply to pending cases).

Hayman v. WYXR-FM, No. 91-6444, 1992 WL 210113 (E.D. Pa. Aug. 21, 1992) (Vanartsdalen, J.) (the Act does not apply to pending cases).

Flagg v. Delaware County, No. 90-7136, 1992 U.S. Dist. LEXIS 15139 (E.D. Pa. Sept. 28, 1992) (McGlynn, J.) (§ 101 of the Act does not apply to pending cases).

Fourth Circuit—District Courts

Khandelwal v. Compuadd Corp., 780 F. Supp. 1077 (E.D. Va. Jan. 15, 1992) (Williams, J.) (the Act does not apply to pending cases).

Patterson v. McLean Credit Union, 784 F. Supp. 268 (M.D. N.C. Feb. 18, 1992) (Ward, J.) (the Act does not apply to pending cases).

Perrell v. International Business Machs., Inc., 785 F. Supp. 1229 (E.D.N.C. Feb. 28, 1992) (Dupree, J.) (the Act does not apply to pending cases).

Rowson v. County of Arlington, Virginia, 786 F. Supp. 555 (E.D. Va. Mar. 19, 1992) (Cacheris, J.) (§ 101 of the Act does not apply to pending cases).

McCormick v. Consolidated Coal Co., 786 F. Supp. 563 (N.D. W.Va. Mar. 20, 1992) (Maxwell, J.) (the Act does not apply to pending cases).

Pascual v. Anchor Advanced Prods., Inc., No. CIV-2-91-362 (E.D. Tenn. Apr. 14, 1992) (Hull, J.) (§ 102 of the Act does not apply to pending cases).

Wallace v. Housing Auth. of the City of Columbia, 791 F. Supp. 137 (D.S.C. May 8, 1992) (Shedd, J.) (the Act does not apply to pending cases).

Hobbs v. Schneider Nat'l Carriers, Inc., 793 F. Supp. 660 (W.D.N.C. June 12, 1992) (Potter, J.) (the Act does not apply to pending cases).

Boyce v. Fleet Finance Inc., No. 2:92CV170, 1992 WL 191596 (E.D. Va. July 7, 1992) (Clarke, J.) (§ 101 of the Act does not apply to pending cases).

Pagana-Fay v. Washington Suburban Sanitary Comm'n, No. H-90-848, 1992 WL 159904 (D. Md. July 8, 1992) (Harvey, J.) (§ 102 of the Act does not apply to pending cases).

Fifth Circuit—District Courts

Stevens v. Mann, No. H-90-2175, 1992 WL 101764 (S.D. Tex. Jan. 21, 1992) (Harmon, J.) (the Act does not apply to pending cases).

Equal Employment Opportunity Comm'n v. Wal-Mart Stores, Inc., No. LR-C-90-865 (E.D. Ark. Feb. 2, 1992) (Woods, J.) (the Act does not apply to pending cases).

West v. Pelican Management Services, 782 F. Supp. 1132 (M.D. La. Feb. 3, 1992) (Noland, J.) (§ 102 of the Act does not apply to pending cases).

Bricker v. Comedy House, Inc., No. LR-C-90-805 (E.D. Ark. Feb. 7, 1992) (Wright, J.) (the Act does not apply to pending cases).

Hall v. Sears, CA-3-90-1514-J, 1992 U.S. Dist. LEXIS 8910 (N.D. Tex. Feb. 11, 1992) (Robinson, J.) (the Act does not apply to pending cases).

Coleman v. Santa Rosa Health Care Corp., No. SA-91-CA-0811 (W.D. Tex. Mar. 2, 1992) (O'Connor, J.) (the Act does not apply to pending cases).

Coleman-Lusk v. Emergency Networks, Inc., CA-3-91-0971-J, 1992 U.S. Dist. LEXIS 6661 (N.D. Tex. Mar. 30, 1992) (Robinson, J.) (§ 102 of the Act does not apply to pending cases).

Ridley v. American Tel. & Tel., No. 92-0061, 1992 U.S. Dist. LEXIS 7277 (E.D. La. May 20, 1992) (Beev, J.) (the Act does not apply to cases involving pre-Act conduct filed after the effective date of the Act).

Koppman v. South Cent. Bell Tel. Co., No. Civ.A.90-4503, 1992 WL 142390 (E.D. La. June 17, 1992) (Clement, J.) (the Act does not apply to pending cases).

Smith v. Garrett, No. 91-3973, 1992 U.S. Dist. LEXIS 9533 (E.D. La. June 19, 1992) (Schwartz, J.) (the Act does not apply to pending cases).

Rice v. Zelaya, No. 91-4594, 1992 WL 165716 (E.D. La. July 8, 1992) (Wynne, J.) (§ 102 of the Act does not apply to pending cases).

McCoy v. Western Atlas Int'l, No. 90-2828, 1992 WL 165733 (E.D. La. July 8, 1992) (Clement, J.) (§ 101 of the Act does not apply to pending cases).

Domengeaux v. Lifetron, Inc., No. 92-2087, 1992 WL 211452 (E.D. La. Aug. 20, 1992) (Livardais, J.) (the Act does not apply to cases involving pre-Act conduct filed after the effective date of the Act).

Alexis v. Wooten, No. 90-1485, 1992 WL 210006 (E.D. La. Aug. 21, 1992) (Livardais, J.) (the Act does not apply to pending cases).

McFarland v. South Cent. Bell, Inc., No. 92-755, 1992 WL 245641 (E.D. La. Sept. 15, 1992) (Clement, J.) (the Act does not apply to cases involving pre-Act conduct filed after the effective date of the Act).

Johnson v. Gillman North, Inc., No. Civ. A. H-92-41, 1992 WL 274315 (S.D. Tex. Sept. 23, 1992) (Botley, J.) (the Act does not apply to cases involving pre-Act conduct filed after the effective date of the Act).

Rogers v. Caps Corp., No. 92-1968, 1992 U.S. Dist. LEXIS 14854 (E.D. La. Sept. 25, 1992) (McNamara, J.) (§ 102 of the Act does not apply to cases involving pre-Act conduct filed after the effective date of the Act).

Evans v. Trowbridge, No. 92-0319, 1992 U.S. Dist. LEXIS 15242 (E.D. La. Oct. 5, 1992) (McNamara, J.) (§ 102 of the Act does not apply to cases involving pre-Act conduct filed after the effective date of the Act).

Sixth Circuit—District Courts

Johnson v. Rice, No. 2:85-CV-1318, 1992 U.S. Dist. LEXIS 830, (S.D. Ohio Jan. 24, 1992) (King, J.) (§ 102 of the Act does not apply to pending cases).

Taylor v. National Group of Companies, Inc., 790 F. Supp. 142 (N.D. Ohio Mar. 6, 1992) (Carr, J.) (the Act does not apply to pending cases).

Craig v. Ohio Dep't of Admin. Servs., 790 F. Supp. 758 (S.D. Ohio Apr. 23, 1992) (Kinneary, J.) (§ 101 of the Act does not apply to pending cases).

Davis v. Therm-O-Disc, Inc., No. 5:91CV1602, 1992 U.S. Dist. LEXIS 6045 (S.D. Ohio May 21, 1992) (Bell, J.) (§§ 101, 102 of the Act do not apply to pending cases).

Tye v. City of Cincinnati, 794 F. Supp. 824 (S.D. Ohio May 21, 1992) (Spiegel, J.) (the Act does not apply to pending cases).

Delfin v. Turnage, 792 F. Supp. 522 (W.D. Ky. June 2, 1992) (Allen, J.) (the Act does not apply to pending cases).

Harris v. Board of Educ. of Columbus, Ohio, City Sch. Dist., No. C-2-86-909, 1992 WL 146637 (S.D. Ohio June 26, 1992) (Smith, J.) (the Act does not apply to pending cases).

Seventh Circuit—District Courts

McKnight v. Merrill Lynch, No. 90-C-597, 1992 WL 74414 (E.D. Wis. Jan. 9, 1992) (Curran, J.) (the Act does not apply to pending cases).

Hameister v. Harley-Davidson, Inc., 785 F. Supp. 113 (E.D. Wis. Feb. 28, 1992) (Curran, J.) (the Act does not apply to pending cases).

McCullough v. Consolidated Rail Corp., 785 F. Supp. 1309 (N.D. Ill. Mar. 3, 1992) (Norgle, J.) (§ 102 of the Act does not apply to pending cases).

Sofferin v. American Airlines, Inc., 785 F. Supp. 780 (N.D. Ill. Mar. 9, 1992) (Norgle, J.) (§ 102 of the Act does not apply to pending cases).

Ribando v. United Airlines, Inc., 787 F. Supp. 827 (N.D. Ill. Mar. 20, 1992) (Norgle, J.) (§ 102 of the Act does not apply to pending cases).

Moore v. Burlington Northern R.R. Co., 790 F. Supp. 781 (N.D. Ill. Mar. 31, 1992) (Aspen, J.) (§ 102 of the Act does not apply to pending cases).

Louis v. Community and Economic Dev. Ass'n of Cook County, No. 92-C-0191, 1992 U.S. Dist. LEXIS 5406 (N.D. Ill. Apr. 15, 1992) (Aspen, J.) (the Act does not apply to cases involving pre-Act conduct filed after the effective date of the Act).

Mazen v. Board of Regents of Regency Univs. of the State of Illinois, 789 F. Supp. 954 (C.D. Ill. Apr. 15, 1992) (Mills, J.) (§ 101 of the Act does not apply to pending cases).

Nigrelli v. Catholic Bishop of Chicago, 794 F. Supp. 246 (N.D. Ill. Apr. 29, 1992) (Maronzi, J.) (§ 102 of the Act does not apply to pending cases).

Kennedy v. Fritsch, No. 90-C-5446, 1992 U.S. Dist. LEXIS 7223 (N.D. Ill. May 14, 1992) (Nordberg, J.) (the Act does not apply to pending cases).

McKnight v. General Motors, No. 87-C-248, 1992 U.S. Dist. LEXIS 8154 (E.D. Wis. June 2, 1992) (Gordon, J.) (§ 101 of the Act does not apply to pending cases).

Sullivan v. Helene Curtis, Inc., No. 90-C-4365, 1992 WL 220783 (N.D. Ill. June 5, 1992) (Holderman, J.) (§ 102 of the Act does not apply to pending cases).

Prymula v. Northern Trust Co., No. 91-C-4710, 1992 U.S. Dist. LEXIS 8238 (N.D. Ill. June 11, 1992) (Nordberg, J.) (§ 102 of the Act does not apply to pending cases).

Bush v. Commonwealth Edison Co., No. 89-C-652, 1992 WL 162253 (N.D. Ill. July 6, 1992) (Aspen, J.) (the Act does not apply to pending cases).

Bloomfield v. Chrysler Corp., No. 90-C-20129, 1992 WL 170569 (N.D. Ill. July 13, 1992) (Reinhard, J.) (the Act does not apply to pending cases).

U.S. Equal Employment Opportunity Comm'n v. Northwestern Steel & Wire, Inc., No. 92-C-20106, 1992 WL 188321 (N.D. Ill. July 20, 1992) (Reinhard, J.) (§ 102 of the Act does not apply to cases involving pre-Act conduct filed after the effective date of the Act).

Melendez v. Illinois Bell Tel. Co., No. 90-C-5020, 1992 WL 182234 (N.D. Ill. July 24, 1992) (Duff, J.) (the Act does not apply to pending cases).

Torres v. Health Charge Corp., No. 91-C-2591, 1992 WL 193556 (N.D. Ill. Aug. 3, 1992) (Guzman, J.) (the Act does not apply to pending cases).

Pandya v. City of Chicago, No. 91-C-5700, 1992 U.S. Dist. LEXIS 12074 (N.D. Ill. Aug. 11, 1992) (Hart, J.) (§ 102(c) of the Act does not apply to pending cases).

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Augustin v. Mason, No. 92-C-1992, 1992 U.S. Dist. LEXIS 14368 (N.D. Ill. Sept. 23, 1992) (Leinenweber, J.) (§ 102 of the Act does not apply to cases involving pre-Act conduct filed after the effective date of the Act).

Khan v. Loyola Univ., Chicago, No. 91-C-8344, 1992 U.S. Dist. LEXIS 15060 (N.D. Ill. Oct. 2, 1992) (Plunkett, J.) (§ 101 of the Act does not apply to pending cases).

Ratay v. Montgomery Ward & Co., No. 92-C-3965, 1992 U.S. Dist. LEXIS 15203 (N.D. Ill. Oct. 6, 1992) (Conlon, J.) (the Act does not apply to pending cases).

Deinde v. American Tel. and Tel. Co., No. 90-C-7347, 1992 U.S. Dist. LEXIS 15575 (N.D. Ill. Oct. 8, 1992) (Andersen, J.) (§§ 101, 102 of the Act do not apply to pending cases).

Eighth Circuit—District Courts

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Hughes v. Matthews, No. LR-C-90-422, 1992 U.S. Dist. LEXIS 8337 (E.D. Ark. Feb. 6, 1992) (Wright, J.) (the Act does not apply to pending cases).

Cook v. Foster Forbes Glass, 783 F. Supp. 1217 (E.D. Mo. Feb. 21, 1992) (Limbaugh, J.) (the Act does not apply to pending cases).

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Gerzick v. Austin, No. 89-0838-CV-W-2, 1992 U.S. Dist. LEXIS 4638 (W.D. Mo. Mar. 13, 1992) (Gaitan, J.) (the Act does not apply to pending cases).

Kientzy v. McDonnell Douglas Corp., No. 90-584C(1), 1992 WL 196769 (E.D. Mo. May 26, 1992) (Noce, J.) (the Act does not apply to pending cases).

Crittendon v. Columbia Orthopaedic Group, No. 91-4054-CV-C-66BA, 1992 WL 240373 (W.D. Mo. June 5, 1992) (Knox, J.) (the Act does not apply to pending cases).

Ninth Circuit—District Courts

Benitez v. Portland Gen. Elec., No. 91-864-PA, 1992 U.S. Dist. LEXIS 5259 (D. Or. Feb. 26, 1992) (Panner, J.) (the Act does not apply to pending cases).

DeHerrera v. M.P.W. Stone, 796 F. Supp. 420 (D. Ariz. July 16, 1992) (Roll, J.) (the Act does not apply to pending cases).

Schroeder v. Potlatch Corp., No. C-89-3695-SBA, 1992 U.S. Dist. LEXIS 12548 (N.D. Cal. Aug. 18, 1992) (Armstrong, J.) (the Act does not apply to pending cases).

Tenth Circuit—District Courts

Hansel v. Public Serv. Co. of Colorado, 778 F. Supp. 1126 (D. Colo. Dec. 11, 1991) (Babcock, J.) (the Act does not apply to pending cases).

Simons v. Southwest Petro-Chem, Inc., No. 90-2243-V, 1992 U.S. Dist. LEXIS 1842 (D. Kan. Jan. 22, 1992) (Van Bebber, J.) (the Act does not apply to pending cases).

Burchfield v. Derwinski, 782 F. Supp. 532 (D. Colo. Jan. 29, 1992) (Finesilver, J.) (the Act does not apply to pending cases).

Golightly-Howell v. Oil Chemical and Atomic Workers Int'l Union, 788 F. Supp. 1158 (D. Colo. Feb. 3, 1992) (Carrigan, J.) (the Act does not apply to pending cases).

Johnson v. Mast Advertising and Publishing, No. 90-2451-L, 1992 U.S. Dist. LEXIS 2860 (D. Kan. Feb. 10, 1992) (Lungstrum, J.) (the Act does not apply to pending cases).

Lange v. CIGNA Individual Fin. Serv. Co., No. 90-2053-0, 1992 U.S. Dist. LEXIS 5734 (D. Kan. Feb. 12, 1992) (O'Conner, J.) (the Act does not apply to pending cases).

Tusa v. Stanley Dry Cleaners, No. 91-2116-V, 1992 WL 50878 (D. Kan. Feb. 25, 1992) (Van Bebber, J.) (the Act does not apply to pending cases), *aff'd*, 1992 WL 219040 (10th Cir. Sept. 10, 1992).

Steinle v. Boeing Co., 785 F. Supp. 1434 (D. Kan. Feb. 26, 1992) (Crow, J.) (the Act does not apply to pending cases).

Guillory-Wuerz v. Brady, 785 F. Supp. 889 (D. Colo. Mar. 15, 1992) (Arraj, J.) (the Act does not apply to pending cases).

Simmons v. City of Kansas City, No. 88-2603-O, 1992 U.S. Dist. LEXIS 5732 (D. Kan. March 16, 1992) (O'Conner, J.).

Brown v. Anheuser-Busch, Inc., No. 91-A-1677, 1992 WL 78065 (D. Colo. Mar. 31, 1992) (Arraj, J.) (the Act does not apply to pending cases).

Gomez v. Martin Marietta Corp., No. 88-1430 (D. Colo. Apr. 1, 1992) (Carrigan, J.) (the Act does not apply to pending cases).

Maxwell v. Handicapped Educ. & Living Programs, No. 91-2387-0, 1992 U.S. Dist. LEXIS 6431 (D. Kan. Apr. 13, 1992) (O'Conner, J.) (the Act does not apply to pending cases).

Donaldson v. Brady, No. 91-A-1841, 1992 WL 119497 (D. Colo. May 14, 1992) (Arraj, J.) (the Act does not apply to pending cases).

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Berry v. General Motors Corp., 796 F. Supp. 1409 (D. Kan. June 17, 1992) (Lungstrum, J.) (the Act does not apply to pending cases).

Equal Employment Opportunity Comm'n v. Century I, L.C., 142 F.R.D. 494 (D. Kan. June 25, 1992) (Lungstrum, J.) (the Act does not apply to pending cases).

Powell v. Board of Pub. Utils. of Kansas City, No. 90-2099-0, 1992 WL 176424 (D. Kan. July 7, 1992) (O'Connor, J.) (the Act does not apply to pending cases).

Scherzer v. Midwest Cellular Tel. Co., No. 91-2473, 1992 WL 214972 (D. Kan. Aug. 10, 1992) (O'Connor, J.) (§ 102 of the Act does not apply to cases involving pre-Act conduct filed after the effective date of the Act).

Little v. Wichita Coca-Cola Bottling Co., No. 91-1205-B, 1992 WL 223758 (D. Kan. Aug. 12, 1992) (Belot, J.) (the Act does not apply to pending cases).

Jacobson v. Roadway Express, Inc., No. 90-2396-0, 1992 WL 221584 (D. Kan. Aug. 20, 1992) (O'Connor, J.) (the Act does not apply to pending cases).

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White v. Union Pacific R.R., No. 91-1371-K, 1992 WL 276639 (D. Kan. Sept. 15, 1992) (White, J.) (the Act does not apply to pending cases).

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Ihedioha v. EMRO Mktg. Co., No. 1:91-CV-2873-DDE, 1992 U.S. Dist. LEXIS 5217 (N.D. Ga. Jan. 29, 1992) (Chancey, J.) (the Act does not apply to pending cases).

Doe v. Board of Comm'rs, Palm Beach County, Florida, 783 F. Supp. 1379 (S.D. Fla. Jan. 30, 1992) (Highsmith, J.) (§§ 101, 102 of the Act do not apply to pending cases).

Adkins v. Jackson County Hosp., No. CV-91-H-2300-NE (N.D. Ala. Feb. 4, 1992) (Hancock, J.) (the Act does not apply to pending cases).

Wren v. USX Corp., No. CV-91-H-2430-S (N.D. Ala. Feb. 4, 1992) (Hancock, J.) (the Act does not apply to pending cases).

Maddox v. Norwood Clinic, Inc., 783 F. Supp. 582 (N.D. Ala. Feb. 14, 1992) (Hancock, J.) (the Act does not apply to pending cases).

Zimmerman v. Atlanta Hawks, Ltd., No. 1:88-CV-2798-WCO (N.D. Ga. Feb. 26, 1992) (Harper, M.J.) (the Act does not apply to pending cases).

Toney v. State of Alabama, No. CV-91-A-438-N, 1992 U.S. Dist. LEXIS 12381 (M.D. Ala. Mar. 4, 1992) (Albriton, J.) (§ 101 of the Act does not apply to pending cases).

Hayes v. Shoney's, Inc., No. 89-30093-RV, 1992 WL 207313 (N.D. Fla. Mar. 12, 1992) (Vinson, J.) (the Act does not apply to pending cases).

Brown v. Keebler Co., No. 1:91-CV-1395RLV, 1992 WL 159121 (N.D. Ga. Mar. 28, 1992) (Feldman, J.) (the Act does not apply to pending cases).

Washington v. Keebler Co. Inc., No. 1:89-CV-765-ODE, 1992 WL 220782 (N.D. Ga. June 2, 1992) (Evans, J.) (the Act does not apply to pending cases).

James v. American Int'l Recovery, Inc., No. 1:89-CV-321-RHH, 1992 WL 196871 (N.D. Ga. June 3, 1992) (Hall, J.) (the Act does not apply to pending cases).

Porter v. American Cast Iron Pipe Co., No. CV91-P-1870-S, 1992 WL 209549 (N.D. Ala. June 19, 1992) (Pointer, J.) (§ 101 of the Act does not apply to pending cases).

King v. Tandy Corp./Radio Shack, No. 91-78-ATH(DF), 1992 WL 174289 (M.D. Ga. July 24, 1992) (Fitzpatrick, J.) (§§ 101, 102 of the Act do not apply to pending cases).

Peters v. Board of Regents Georgia S. Univ., No. 1:91-CV2627JOF, 1992 WL 252134 (N.D. Ga. Sept. 14, 1992) (Forrester, J.) (the Act does not apply to pending cases).

Tolbert v. City of Daphne and Parsons, No. 92-0384-BH-M, 1992 U.S. Dist. LEXIS 15323 (S.D. Ala. Oct. 5, 1992) (Hand, J.) (the Act does not apply to pending cases).

D.C. Circuit—District Courts

Van Meter v. Barr, 778 F. Supp. 83 (D.D.C. Dec. 18, 1991) (Gesell, J.) (§ 102 of the Act does not apply to pending cases).

Mitchell v. Secretary of Commerce, No. 82-3020, 1992 U.S. Dist. LEXIS 147 (D.D.C. Jan. 10, 1992) (Richey, J.) (§ 114 of the Act does not apply to pending cases).

Adrain v. Alexander, No. 88-3581 (D.D.C. Jan. 15, 1992) (Pratt, J.) (§ 102 of the Act does not apply to pending cases).

Stewart v. Brady, No. 90-0730 (D.D.C. Jan. 16, 1992) (Greene, J.) (the Act does not apply to pending cases).

Mayfield v. Barr; Edwards v. Barr, Nos. 86-0435, 86-2447 (D.D.C. Jan. 21, 1992) (Pratt, J.) (§ 102 of the Act does not apply to pending cases).

Horne v. Thornburgh, No. 88-2367 (D.D.C. Jan. 29, 1992) (Green, J.) (the Act does not apply to pending cases).

Parker v. Frank, No. 91-2442, 1992 U.S. Dist. LEXIS 5263 (D.D.C. Feb. 25, 1992) (Hogan, J.) (§ 102 of the Act does not apply to pending cases).

Hatcher-Capers v. Haley, 786 F. Supp. 1054 (D.D.C. Mar. 20, 1992) (Richey, J.) (§ 102 of the Act does not apply to pending cases).

Brereton v. Communications Satellite Corp., No. 86-3082, 1992 U.S. Dist. LEXIS 6712 (D.D.C. May 7, 1992) (Richey, J.) (§ 102 of the Act does not apply to pending cases).

Jones v. Washington Metro. Area Transit Auth., No. 89-0552, 1992 U.S. Dist. LEXIS 11504 (D.D.C. Aug. 7, 1992) (Lamberth, J.) (§ 102 of the Act does not apply to pending cases).

Cook v. Billington, No. 82-0400, 1992 U.S. Dist. LEXIS 12519 (D.D.C. Aug. 14, 1992) (Johnson, J.) (§§ 104, 105 of the Act do not apply to pending cases).

No. 92-757

Supreme Court, U.S.

FILED

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

BARBARA LANDGRAF,

v.

Petitioner,

USI FILM PRODUCTS, BONAR PACKAGING, INC., and
QUANTUM CHEMICAL CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioner's Questions I and II present any issue meriting review by this Court?

LIST OF PARTIES AND RULE 29.1 STATEMENT

The Respondents were defendants-appellees below. Quantum Chemical Corporation is a Virginia corporation and a publicly traded company. USI Film Products was a manufacturing plant in the USI Division of Quantum. Bonar Packaging, Inc., is a Canadian corporation and purchased the USI Film Products plant from Quantum subsequent to Petitioner's resignation from employment at the plant. Quantum does not have any parent company. Quantum has the following non-wholly-owned subsidiary companies:

Atlantic Energy, Inc.
 CUE Insurance Limited
 Fallon Propane and Butane Company
 Northwest L.P.G. Supply Ltd.
 Petrolane Finance Corp.
 Petrolane Gas Service L.P.
 Petrolane Incorporated
 Quantum Petrochemical Corporation Limited

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-757

BARBARA LANDGRAF,
v. *Petitioner,*

USI FILM PRODUCTS, BONAR PACKAGING, INC., and
QUANTUM CHEMICAL CORPORATION,
Respondents.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit**

RESPONDENTS' BRIEF IN OPPOSITION

INTRODUCTION

Respondents Quantum Chemical Corporation ("Quantum"), its USI Film Products plant, and Bonar Packaging, Inc., subsequent purchaser of the plant, submit this Brief In Opposition to the Petition for a Writ of Certiorari filed by Petitioner Barbara Landgraf. Petitioner seeks review of a unanimous decision by the United States Court of Appeals for the Fifth Circuit (Petition Appendix A) affirming a decision and judgment entered by the United States District Court for the Eastern District of Texas (Petition Appendices B and C). For the reasons explained below, Respondents urge the Court to deny the Petition.

COUNTERSTATEMENT OF THE CASE¹

Petitioner resigned her employment with Quantum January 17, 1986. On July 21, 1989, Petitioner commenced a civil action against Respondents under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* A bench trial was held on February 4, 1991. On May 22, 1991, the district court entered Findings of Fact and Conclusions of Law (Petition Appendix B) and judgment against Petitioner (Petition Appendix C). Petitioner appealed to the Court of Appeals for the Fifth Circuit. The appeal was briefed.

On November 21, 1991, the Civil Rights Act of 1991 ("Act"), Public Law No. 102-166, 105 Stat. 1071 (1991), was signed into law. On February 6, 1992, one year after the trial, Petitioner raised to the Fifth Circuit a claim of potential retroactive application of the Act to her previously litigated claim. On July 30, 1992, the Fifth Circuit denied Petitioner's appeal and affirmed the judgment of the District Court (Petition Appendix A). *Landgraf v. USI Film Products, et al.*, 968 F.2d 427 (5th Cir. 1992).

The Fifth Circuit utilized the approach of *Bradley v. School Board of Richmond*, 416 U.S. 696 (1974), that a court generally should "‘apply the law in effect at the time it renders its decision,’" 968 F.2d at 432, quoting *Bradley*, 416 U.S. at 711. Citing *Bennett v. New Jersey*, 470 U.S. 632 (1985), the Fifth Circuit concluded that it could not presume that Congress "intended to upset cases which were properly tried under the law at the time of trial." 968 F.2d at 432. Instead, "[t]o require [the employer] to retry this case because of a statutory change [right to jury trial] enacted after the trial was completed would be an injustice and a waste of judicial

¹ Petitioner's Statement of the Case is improperly argumentative and plaintive.

resources." *Id.* at 432-33. Similarly, "[r]etroactive application of this [compensatory and punitive damage] provision to conduct occurring before the Act would result in a manifest injustice," because these added damages constitute "‘an additional and unforeseen obligation’ contrary to the well-settled law" at the time of trial. *Id.* at 433, quoting *Bradley*, 416 U.S. at 721.

REASONS FOR DENYING THE WRIT

I. THIS FIFTH CIRCUIT DECISION AND THE NINTH CIRCUIT'S *DAVIS* DECISION DO NOT NECESSARILY CONFLICT ON THE SAME MATTER.

The Fifth Circuit held in this case that the two substantive provisions of the Act raised by Petitioner after her appeal from the trial court's judgment, the right to a jury trial [§ 102], 42 U.S.C. § 1981A(c), and the availability of compensatory and punitive damages [§ 102], 42 U.S.C. § 1981A(a)(1), should not be applied retroactively to cases that already have been adjudicated and are on appeal. *Landgraf*, 968 F.2d at 432-33. The Fifth Circuit found no clear statutory language or legislative history. It noted that the principles of judicial presumptions on retroactivity were somewhat uncertain, *see Bradley v. School Board of Richmond*, 416 U.S. 696, 715-16 (1974) (court should apply the law in effect at the time unless there is clear statutory or legislative history to the contrary or unless doing so would result in a manifest injustice), and *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988) (presumption against retroactivity unless the language of the statute or its legislative history require a contrary result). The Fifth Circuit did not try to resolve any uncertainty caused by these cases, for it concluded that, even under *Bradley*, § 102 should not be applied retroactively. The Court found that to do so would be a manifest injustice, because a case that had been properly tried under the law at the time of trial would be upset and to retry it would

be an injustice and a waste of judicial resources. *Landgraf*, 968 F.2d at 432-33. The Court also found that to apply the provision allowing recovery of compensatory and punitive damages would be an injustice, because permitting damages that were not available at the time of trial would pose an additional or unforeseeable obligation contrary to the well-settled law before the Act's date of enactment. *Id.* at 433.

Petitioner contends the Ninth Circuit decision in *Davis v. City and County of San Francisco*, 976 F.2d 1536 (9th Cir. 1992), is in conflict with the holding in her case. The only provision of the Act involved in *Davis* was that allowing for recovery of the cost of expert witnesses [§ 113], 42 U.S.C. § 2000e-5(k). The issue was whether that section concerning costs and fees should be applied to *Davis'* case, which had been tried and was on appeal on the date the Act became effective.² The Ninth Circuit held that the language of the Act itself made it clear the Act was to be applied to pending cases. *Id.* at 13. *Landgraf* thus holds that § 102 should not be applied retroactively, and *Davis* holds that § 113 should.³

The Act contains numerous provisions on a variety of matters, some of which involve substantive rights and liabilities, others of which do not. Respondents submit that applying Section 113, concerning costs such as the

² *West Virginia Hospitals, Inc. v. Casey*, 111 S.Ct. 1138, 1148 (1991), held that 42 U.S.C. § 1988 (an attorney's fee provision parallel to 706(k) in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k)) did not permit recovery of expert witness fees. Thus, a party could only recover the standard witness fees of \$40.00 a day available under 28 U.S.C. § 1821(b). The issue in *Davis* was whether she would recover \$40.00 a day for the expert witness or the \$12,200.00 she requested.

³ The Ninth Circuit's decision in *Davis* is elaborate in its analysis, but the context and application of that analysis is the non-substantive issue of the costs of an expert witness, not the substantive rights and liabilities of jury trials and compensatory or punitive damages dealt with in *Landgraf*. There is no conflict "on the same matter." Supreme Court Rule 10.1(a).

expert witness fees involved in *Davis*, to a case pending trial or appeal would not be considered a manifest injustice under *Bradley*. Rather, it is consistent with *Bradley*, in which this Court held that applying a provision for the award of attorney fees retroactively was not a manifest injustice. 416 U.S. at 721. It also is consistent with the holding of the Fifth Circuit in *Landgraf*, that retroactively allowing jury trials and compensatory and punitive damages (particularly in cases that have already been tried) is a manifest injustice under *Bradley*. 968 F.2d at 432-33. Each conclusion is consistent under *Bradley*.

II. THE ALLEGATION OF CONFLICT BETWEEN DECISIONS OF TWO CIRCUITS DOES NOT REQUIRE GRANTING THE PETITION.

The existence of a conflict between Circuit Courts of Appeals may be a basis for granting a Petition for Writ of Certiorari, but that does not mean the Court is required to accept this case for review. The Court frequently has denied Petitions for Writ of Certiorari that were based on a conflict in the Circuits. *See, e.g., Walker v. United States*, 113 S.Ct. 443 (1992); *Christophersen v. Allied-Signal Corp.*, 112 S.Ct. 1280 (1992) (Justices White and Blackmun dissenting) (certiorari denied, despite a split in the Circuits, on the issue of the appropriate standard for determining the admissibility of expert testimony); *Beaulieu v. United States*, 110 S.Ct. 3302 (1990) (Justice White dissenting and noting 48 instances during that term when Petitions based on Circuit splits had been denied) (certiorari denied, despite a split in the Circuits, on the issue of reliance on co-conspirators' testimony for purposes of sentencing); *Brown Transport Corp. v. Atcon, Inc.*, 439 U.S. 1014 (1978) and cases cited therein (Justice White and Blackmun dissenting) (certiorari denied despite a split in the Circuits, on the issue of whether the failure of a common carrier to comply with the time limits of the Interstate Commerce

Commission regulations estops it from collecting freight charges from the shipper). There are many reasons to do so here.

A. The Court has had the opportunity to address whether the Act or portions of it should be applied retroactively but has chosen not to do so.

The Act has been in effect for over one year. During this time and prior to October 6, 1992 (the date of the *Davis* decision), several Circuits addressed the issue of the Act's retroactivity and determined that it or portions of it should not be applied retroactively. Petitions for Writ of Certiorari were denied in two of those cases. *Moze v. American Commercial Marine Serv. Co.*, 963 F.2d 929 (7th Cir.), *cert. denied*, 113 S.Ct. 207 (1992); *Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir.), *cert. denied*, 113 S.Ct. 86 (1992).

Even assuming (for argument only) Petitioner's claim that there may be a conflict between *Landgraf* and *Davis*, the Court should continue to exercise its discretion and deny the Petition on the retroactivity issue as it has in the past. *See, e.g., Walker v. United States, supra* (Justices White and Blackmun dissenting) (certiorari denied despite split in Circuits; Court had declined to review the same issue on three prior occasions).

B. Only one of numerous sections of the Act is at issue in this particular case.

The issue in *Landgraf* only involves whether one section of the Act [§ 102] should be applied retroactively. The Act contains numerous other provisions. They cover a variety of subjects, both substantive and procedural. Different results might obtain based on which particular section or sections are at issue. As noted above, there is as yet no conflict in the Circuits on the issue of prospec-

tive application of § 102 in *Landgraf*.⁴ The Court should wait until further law develops, to see if a case involving a broader range of sections comes forth.

C. The particular chronological context in which this case arose is narrow.

The issue in *Landgraf* is limited to whether one section of the Act, involving substantive rights and obligations, should be applied to a case that involves conduct occurring five years before the Act's effective date, that already was tried on the merits before the Act's effective date, and already was on appeal (indeed, already had been briefed) when the Act became effective. That is a unique status giving rise to particular manifest injustice under *Bradley*.

Cases will arise under other fact patterns, such as cases which are tried *after* the effective date but were filed before the Act's effective date and arise from conduct occurring before that date; or were filed after the Act's effective date and arise from conduct occurring before that date; or were filed either before or after the Act's effective date and arise out of conduct that straddles the effective date. The Court may find it more appropriate to wait until a case comes before it containing a fact pattern in which the case had not been adjudicated, appealed and briefed as of the Act's date of enactment.

D. Variance in results of the Circuits on this issue is not unexpected and not intolerable.

Uniformity in the Circuits on the issue of retroactivity is not required on an absolute basis. Inherently ununiform results may be expected, and is not intolerable, because the different issues and facts involved, at dif-

⁴ There is a split in the Circuits over Section 113 at issue in *Davis*. The Eighth Circuit held that Section 113 should not be applied retroactively. *Huey v. Sullivan*, 971 F.2d 1362 (8th Cir. 1992). *Davis* held that it should. Section 113 is not involved here.

ferent points in the legal process, virtually guarantee somewhat different cutting off points in different Circuits. If these vary a bit, Circuit to Circuit, the variance is not an issue of national importance. Different cases are litigated at different speeds, and the individual reactions of Circuits to the particular cases before them do not give rise to a conflict meriting the Court's review.

E. The issue is inherently self-limiting.

Even viewed broadly, this issue—the retroactivity of the Act—is inherently self-limiting in its effect. It will only affect a very limited pool of cases for a very limited period of time, after which the issue will be moot. This is not the kind of case to which the Court should devote its scarce resources.

F. Allowing other Circuits further opportunity to address retroactivity will provide greater illumination of whether the issue has created a conflict necessitating the Court's attention.

Petitioner contends that the Courts are in “hopeless disarray.” [Petition at p. 6]. That overstates the situation. Seven Circuits have addressed the retroactivity issue, but only one Circuit has found that any section of the Act should be applied retroactively, and that section involved witness fees, not substantive obligations or rights. The fact that one Circuit has now found retroactivity for one section of the Act involving costs and fees does not amount to “hopeless disarray.”

The Court should consider waiting until one or more Circuits (including the remaining five Circuits that have not yet spoken to the Act) address the Ninth Circuit's *Davis* decision. This will permit the opportunity for greater illumination on the issue of the Act's retroactivity and whether there is a conflict that needs to be resolved by this Court.

III. VICTIMS OF DISCRIMINATION ARE AFFORDED REDRESS IRRESPECTIVE OF WHETHER LANDGRAF'S PETITION IS GRANTED.

Petitioner argues that the Petition must be granted to afford her (and those in her situation) redress because one of the purposes of the Act was to provide additional remedies to deter unlawful discrimination. It is a *non sequitur* for Petitioner to argue that such a purpose is retroactive: the Act hardly can deter conduct already alleged to have occurred *before* the Act.

Petitioner's situation (case tried and law at the time applied, before the effective date of the Act) would apply to any plaintiff who litigated in a Title VII lawsuit prior to the Act's effective date (from 1965 through November 21, 1991). It is no more an injustice for Landgraf not to be able to *retry* her case to a jury (with the opportunity to recover compensatory and punitive damages not previously available) than it is for any plaintiff in years past not to obtain a retrial by jury with the opportunity to recover damages that were not available under the law in effect when their cases were tried.

Petitioner (like all other plaintiffs who litigated on the merits before November 21, 1991) was afforded the appropriate redress available under Title VII as it existed at that time. Individuals who were or may be subjected to intentional discrimination after November 21, 1991, will be afforded the appropriate redress available at the time their cases are tried, and the jury trial and damage provisions of § 102 *will* operate to deter unlawful discrimination.

IV. ALLEGED MISAPPLICATION OF A PRINCIPLE IS NOT A BASIS TO GRANT THE PETITION.

In a final argument, Petitioner shifts from the need to resolve an alleged conflict between *Bradley* and *Bowen* concerning the application of judicial presumptions to a contention that there is no conflict, only a misapplication of the principle by the Fifth Circuit.

Several Circuits have concluded that *Bradley* and *Bowen* can be read in a non-conflicting manner, particularly given *Bennett v. New Jersey*, 470 U.S. 632, 638-40 (1985). See, e.g., *Johnson v. Uncle Ben's Inc.*, 965 F.2d 1363, 1373-74 (5th Cir. 1992); *Mozee v. American Commercial Marine Serv. Co.*, 963 F.2d 929, 936 (7th Cir.), cert. denied, 113 S.Ct. 207 (1992); *Gersman v. Group Health Ass'n, Inc.*, 975 F.2d 886, 898-900 (D.C. Cir. 1992). The Court in *Bennett* noted that *Bradley* was limited by another rule of statutory construction: statutes affecting substantive rights and liabilities are presumed to have only prospective effect. 470 U.S. at 638-40. *Bradley* involved allowance of attorney fees, which is not a provision involving substantive rights under a statute. The issue of the applicability of a provision for the award of expert witness fees in *Davis* is parallel to the issue of the applicability of a provision for the award of attorney fees in *Bradley*. The matters (availability of a jury trial and compensatory or punitive damages) at issue in *Landgraf* are different: they *do* affect substantive rights and liabilities. As in *Bennett*, they should not be given prospective effect. 470 U.S. at 639-40.

The Petition here ultimately contends that the Fifth Circuit simply misapplied the principle of judicial presumptions that it used. Respondents disagree, but even assuming Petitioner's contention *arguendo*, the mere misapplication of a principle in a particular case should not be a basis upon which the Court grants a Petition for a Writ of Certiorari.

Petitioner's argument here is not an attempt to have the Court resolve any true conflict in the Circuits. Rather, it is an effort to have the Court reject the precedent of *Bradley* and *Bennett* and create a rule that undoes cases already tried under one set of substantive rights, obligations and remedies that were the law of this land at the time of trial. As *Bennett* recognizes, "statutes affecting substantive rights and liabilities are presumed to have only prospective effect." 470 U.S. at

639-40, 105 S.Ct. at 1560. There is not yet any conflict in the Circuits concerning the non-retroactive application of the "substantive rights and liabilities" in the Civil Rights Act of 1991. Petitioner's argument that the Fifth Circuit erred in applying the principles of *Bradley* and *Bennett* does not make an issue meriting review by this Court.

CONCLUSION

The Ninth Circuit's *Davis* decision does not present a square and unreconcilable conflict with the Fifth Circuit's decision in this case. Even assuming a conflict, this is not an appropriate case for the Court to address. The issue is self-limiting, and the impact is narrow, confined and not intolerable. Further experience will help illuminate the issue, and further Circuits should be given the opportunity to address the Ninth Circuit's *Davis* decision before a determination of whether granting Certiorari is necessary or appropriate. The Fifth Circuit's principle of the manifest injustice of retrying conduct and claims litigated, tried, appealed and briefed prior to the enactment of new legislation, consistent with both *Bradley* and *Bennett*, need not be disturbed by this Court until there is a clearer and more compelling conflict in the Circuits on *that* issue. The Petition should be denied.

Respectfully submitted,

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(3)
No. 92-757

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
October Term 1992

BARBARA LANDGRAF,

Petitioner,

v.

USI FILM PRODUCTS,
BONAR PACKAGING, INC., AND
QUANTUM CHEMICAL CORPORATION,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT**

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February 10, 1993.

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This supplemental brief is filed to bring to the Court's attention a new case that was recently decided by the Ninth Circuit.

On February 9, 1993, the Ninth Circuit, in *Estate of Barbara L. Reynolds v. Lynn Martin*, No. 91-15237, 1993 WL 27657 (9th Cir. Feb. 9, 1993), held that the Civil Rights Act of 1991 (the "Act") applies to pending cases. A copy of the Ninth Circuit's opinion is annexed hereto as Appendix A. The court held that the Act entitled the plaintiff-appellee to pre and post-judgment interest on her damage award in her wrongful discharge suit. Referring to Sections 402(b) and 109(c) of the Act, the Ninth Circuit wrote that

"to hold . . . that the Act as a whole applies only prospectively would violate the fundamental 'rule of statutory interpretation that no provision should be construed to be entirely redundant' We may not construe the Act so as to make Congress' words in Sections 402(b) and 109(c) 'mere surplusage' Hence we conclude that Congress specifically provided that the Act operate only prospectively in two instances because it generally intended the Act, including Section 114(2), to apply to cases pending at its enactment".

The court also noted that "in holding as we do, we break ranks with the other circuits that have decided this issue [citing decisions from the Eleventh, District of Columbia, Fifth, Seventh, Eighth and Sixth Circuits]. We do so in the conviction that the plain language of the Act compels our result".¹

¹ Petitioner cited and relied on *Davis v. City of San Francisco*, 976 F.2d 1536 (9th Cir. 1992) in support of her petition for writ of certiorari at pages 6, 7, 8 and 9 of the Petition. Four days before the *Reynolds* decision, by order dated February 5, 1993, the Ninth Circuit vacated its opinion in *Davis*, *supra*, as moot. *Davis v. City of San Francisco*, No. 91-15113, 1993 WL 23765 (9th Cir. Feb. 5, 1993). The court stated that

"in light of the parties' settlement of plaintiff-appellee's claims to expert witness fees while the court had under consideration whether to take en

Thus, there continues to be a clear conflict in the circuits with respect to the important question presented by the petition.

banc the issue of retroactivity of the Civil Rights Act of 1991, which amended 42 U.S.C. § 2000e-5(k) to provide explicitly for the award of expert fees as a part of costs, we vacate as moot that portion of the opinion that affirms the district court's award of expert witness fees in this case". A copy of that order is annexed hereto as Appendix B. As a technical matter, after the Ninth Circuit's subsequent action in the *Davis* case, there was no longer a split in the circuits with respect to the question whether the Act applied to pending cases. Following the *Reynolds* decision, however, the split has been reestablished.

CONCLUSION

For the reasons discussed by the Ninth Circuit in *Estate of Barbara L. Reynolds, supra*, and for the reasons set forth in her petition for certiorari, petitioner respectfully requests this Court to issue a writ of certiorari to review the decision of the Fifth Circuit.

February 10, 1993.

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APPENDIX A

**OPINION OF THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT**

February 9, 1993

The Secretary of Labor appeals the district court's award of pre and postjudgment interest on damages awarded to Barbara Reynolds in her wrongful discharge suit under the Rehabilitation Act. We hold that the Civil Rights Act of 1991 entitles Reynolds to pre and postjudgment interest on her award. Thus, we affirm.

BACKGROUND

Plaintiff-appellee Barbara Reynolds was an employee of the Department of Labor from July 1, 1979 until September 26, 1980, when she was discharged. After exhausting administrative remedies, Reynolds sued the Secretary of Labor in the district court, alleging violations of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 701 et seq., the Civil Service Reform Act, 5 U.S.C. § 1201 et seq., and breach of contract. The district court granted summary judgment for the Secretary. Reynolds appealed, solely with regard to her Rehabilitation Act claim. On appeal, we reversed and remanded the case for trial. *See Reynolds v. Brock*, 815 F.2d 571 (9th Cir. 1987).

Reynolds died while the case was pending on remand. The administrator of Reynolds' estate was substituted for her as plaintiff. The parties consented to trial before a magistrate without a jury. The court found that Reynolds' discharge violated the Rehabilitation Act. Citing the remedial provisions of the Act, the court awarded back pay, with prejudgment interest, and costs including attorney's fees. Judgment was entered accordingly. The judgment stated that Reynolds was also entitled to postjudgment interest under 28 U.S.C. § 1961.

The Secretary moved for an amendment of the judgment to eliminate the award of interest. The motion was denied. The district court determined that the interest provision of the Back Pay Act, 5 U.S.C. § 5596, applied to Reynolds' back pay award.

The parties entered into a settlement agreement that resolved all issues in the case except the issue of Reynolds' entitlement to interest on her back pay award. Thus, the only question remaining in the case is whether an employee of the United States found to be entitled to back pay under the Rehabilitation Act is entitled to an award of pre or postjudgment interest on that back pay.

DISCUSSION

We review the district court's award of interest on Reynolds' back pay award in light of the Civil Rights Act of 1991, which became law after the district court entered its judgment in this

case. We conclude that the Act applies to cases pending on its effective date and thereby entitles Reynolds to receive pre and postjudgment interest on her back pay award under the Rehabilitation Act.

Jurisdiction and Standard of Review

We have jurisdiction over this appeal under 28 U.S.C. § 1291. Whether Reynolds is entitled to interest on the back pay awarded by the district court is a question of law that we review de novo. *See United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir. 1984) (en banc), cert. denied, 469 U.S. 824 (1984).

Civil Rights Act of 1991

The Civil Rights Act of 1991 ("Act" or "Civil Rights Act of 1991") was signed into law on November 21, 1991. See Pub. L. No. 102-166, 105 Stat. 1071 (1991). The Act was intended, in part, "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." Civil Rights Act of 1991, § 3(4). Among these decisions is *Library of Congress v. Shaw*, 478 U.S. 310 (1986).

In *Shaw*, the Supreme Court held that prejudgment interest was not available against the federal government under Title VII. In enacting the Civil Rights Act of 1991, Congress amended Title VII to specify that federal employees are entitled to all of the remedies ordinarily available under Title VII, including payment of interest. Section 114(2) of the Act amends section 717 of the Civil Rights Act of 1964 (codified as amended at 42 U.S.C. § 2000e-16) to provide that "the same interest to compensate for delay in payment shall be available [to federal employees] as in cases involving nonpublic parties." Nonpublic parties are liable for pre and postjudgment interest under 28 U.S.C. § 1961. Under the amended Act, the government is similarly liable because section 114(2) of the Act provides an express congressional waiver of the government's ordinary sovereign immunity from interest on judgments entered against it. *See, e.g., Hall v. Bolger*,

768 F.2d 1148, 1151-52 (9th Cir. 1985) (holding that an express congressional waiver abrogates governmental immunity from postjudgment interest).

The remedial provisions of the Rehabilitation Act, 29 U.S.C. § 794a(a)(1), incorporate 42 U.S.C. § 2000e-16 by reference. Reynolds has successfully litigated a claim under the Rehabilitation Act. Hence, if the Civil Rights Act of 1991 applies to cases pending at its enactment, it entitles Reynolds to receive pre and postjudgment interest on her back pay award under the Rehabilitation Act.

A.

The Supreme Court has issued apparently conflicting opinions on whether-absent clear statutory direction regarding retroactivity-congressional enactments are to be presumed retroactive or only prospective in application. Compare *Bradley v. Richmond School Bd.*, 416 U.S. 696, 711 (1974) (“[A] court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.”), with *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (“[C]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.”). The Court has noted this “apparent tension,” but it has stated unambiguously that where congressional intent is clear as to a statute’s retroactive or prospective application, that intent governs. *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990); see also *Bradley*, 416 U.S. at 711; *Bowen*, 488 U.S. at 208. Because we conclude that the plain language of the Act is conclusive, we need not choose between the *Bradley* and *Bowen* presumptions, nor need we attempt to reconcile the cases. See, e.g., *Baynes v. AT & T Technologies, Inc.*, 976 F.2d 1370 (11th Cir. 1992); *Gersman v. Group Health Ass’n, Inc.*, 975 F.2d 886, 898-99 (D.C. Cir. 1992) (holding that *Bradley* and *Bowen* are to be reconciled by distinguishing between the presumptive prospective application of substantive statutory provisions and the

presumptive retroactivity of remedial provisions.) Under either the *Bradley* or *Bowen* approach, when Congress’ intent about retroactivity is clear from the statutory language, as in this case, that language controls judicial construction. See *Kaiser*, 494 U.S. at 835 (quoting *Consumer Product Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

Three provisions of the Civil Rights Act of 1991 explicitly address the statute’s applicability to pending cases. Section 402 of the Act is entitled “Effective Date.” Section 402(a) states: “Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment.” We have held that a statement that an act shall take effect upon enactment, on its own, does not necessarily dictate that the act applies retroactively to pending cases; however, we have considered such language relevant to our holding that a statute applied retroactively because we found that the language provided “some indication that [Congress] believed that application of its provisions was urgent.” *In re Reynolds*, 726 F.2d 1420, 1423 (9th Cir. 1984) (construing the Omnibus Budget Reconciliation Act of 1981). See also *Stender v. Lucky Stores, Inc.*, 780 F. Supp. 1302, 1304 (N.D. Cal. 1992) (citing *In re Reynolds* in support of its holding that the plain language of the Civil Rights Act of 1991 mandates that the Act applies to pending cases).

Importantly, though, the language of section 402(a) goes beyond that at issue in *In re Reynolds*. Section 402(a) states as a general matter that the Act, as with the Omnibus Budget Reconciliation Act, is to “take effect upon enactment.” That general language, however, is qualified by the clause “[e]xcept as otherwise specifically provided.” A bedrock principle of statutory construction requires us to find meaning in this qualifying clause: “The cardinal principle of statutory construction is to save and not to destroy. It is our duty to give effect, if possible, to every clause and word of a statute, rather than to emasculate an entire section. . . .” *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (quotation omitted). “[I]t is the duty of the court to give significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose, and to give effect to the statute as a whole, and not

render it partially or entirely void." *Bresgal v. Brock*, 843 F.2d 1163, 1166 (9th Cir. 1987) (quoting *Matter of Borba*, 736 F.2d 1317, 1320 (9th Cir. 1984)).

The qualifying clause of section 402(a), if it is to mean anything, must mean that the Act contains counterexamples that specifically provide for exceptions to the general rule enunciated elsewhere in section 402(a). The only provisions of the Act that can be read as specifically departing from the general rule are sections 402(b) and 109(c). As discussed below, those sections state that they are not to be applied retroactively. Thus, section 402(a), when read in light of the language of the Act taken as a whole, can only be read to establish a rule that the Act in general is to be applied retroactively. In other words, the potential ambiguity of the phrase "take effect upon enactment" disappears when construed in *pari materia* with the qualifying clause of section 402(a), and with sections 402(b) and 109(c).

We also hold that the language of sections 402(b) and 109(c), even when measured independently of section 402(a), compels us to find that the Act applies to pending cases. Section 402(b) provides: "Notwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983." The sole effect of this section is to prevent the provisions of the Act that overrule *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), from applying to the *Wards Cove* litigation itself, which is still pending in this circuit.

Section 109(c) is entitled "Application of Amendments" and states: "The Amendments made by this section shall not apply with respect to conduct occurring before the date of the enactment of this Act." This section extends the protections of Title VII to United States citizens working overseas for American companies and thus overrules *EEOC v. Arabian American Oil Co.*, 111 S. Ct. 1227 (1991).

Each of these provisions, stating that in specific instances the Act shall not apply to cases pending at its enactment, provides compelling evidence that Congress intended the Act in general

to apply to such cases. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)); *In re Salem Mortgage Co.*, 783 F.2d 626, 631 n.14 (6th Cir. 1986) (provision of Bankruptcy Amendments Act stating that a particular section shall not apply to pending cases implies that remaining provisions of the Act apply to pending cases); accord *Carlton v. BAWW, Inc.*, 751 F.2d 781, 787 n.6 (5th Cir. 1985).

Congress would have had no need to provide that the Act lacks force in ongoing litigation involving Wards Cove or American businesses overseas if it had not generally intended the Act to apply to pending cases. To hold, then, that the Act as a whole applies only prospectively would violate the fundamental "rule of statutory interpretation that no provision should be construed to be entirely redundant." *Kungys v. United States*, 485 U.S. 759, 778 (1988); see also *Colautti v. Franklin*, 439 U.S. 379, 392 (1979) (discussing the "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative"); *United States v. Handy*, 761 F.2d 1279, 1280 (9th Cir. 1985) ("A statute should be construed so as to avoid making any word superfluous."); *Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825, 837 (1988); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). We may not construe the Act so as to make Congress' words in sections 402(b) and 109(c) "mere surplusage." *United States v. Mehrmanesh*, 689 F.2d 822, 829 (9th Cir. 1982). Hence, we conclude that Congress specifically provided that the Act operate only prospectively in two instances because it generally intended the Act, including section 114(2), to apply to cases pending at its enactment.¹

¹ Finally, we note that another provision of the Act, subsection 108(n)(2)(A), supports our conclusion that the statutory language requires that the Act be applied retroactively. Section 108 precludes certain collateral challenges to litigated or consent judgments involving claims of

We further note that our construction of the Act is buttressed by other statutory language in which Congress explicitly stated its goal in enacting the statute. In the introductory passages of the Act, Congress expressly stated that its legislation was motivated by a desire to reverse a number of Supreme Court decisions that had narrowly construed various employment discrimination laws. In section 2 of the Act, Congress expressed its "finding" that "the decision of the Supreme Court in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), ha[d] weakened the scope and effectiveness of Federal civil rights protections," and in section 3 it declared that among its purposes in passing the Act was its desire to "codify the concepts of 'business necessity' and 'job related' enunciated in . . . Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)" and to "respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination."²

employment discrimination, overruling *Martin v. Wilks*, 490 U.S. 755 (1989). Subsection 108(n)(2)(A) specifies: "Nothing in this subsection shall be construed to alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened." The subsection's first clause serves to make clear that section 108 has no effect on the standards for intervention under Federal Rule of Civil Procedure 24; the subsection's second clause states that section 108 does not apply to the rights of parties who had successfully intervened in a case prior to the effective date of the Act. This second clause would be nonsensical unless the Act could otherwise be construed to apply retroactively to parties who had already intervened in a case prior to the Act's effective date.

² Section 101 of the Act reverses limits on the scope of 42 U.S.C. § 1981 created by *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). Section 101 defines "make and enforce contracts" as "the making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." Section 105 overrules *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), which held that an employer bears only the burden of production, not the burden of persuasion, as to its business necessity. Under section 105, the employer bears the burden of production and persuasion on this point. Section 107 modifies the Supreme Court's holding in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), which held that an employer could avoid liability for intentional discrimination in

Congress' expressed desire to undo the effects of recent Supreme Court decisions, and to restore civil rights law to its previous state, reinforces our belief that Congress intended the courts to apply the Act to cases presently before them. "Retroactive application of a statute is appropriate when Congress enacts a statute to clarify the Supreme Court's interpretation of previous legislation thereby returning the law to its previous posture." *Ayers v. Allain*, 893 F.2d 732, 754-55 (5th Cir. 1990), *vacated on other grounds sub nom. United States v. Fordice*, 112 S. Ct. 2727 (1992).³ Indeed, to hold otherwise with respect to this Act would lead to incongruous results. In the eight Supreme

"mixed motive" cases if the employer could demonstrate that the same action would have been taken in the absence of the discriminatory motive. Section 107 states that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." Section 108 overrules *Martin v. Wilks*, 490 U.S. 755 (1989), by prohibiting certain challenges to consent decrees by individuals who had a reasonable opportunity to object to the decree or whose interests were adequately represented by another party. Section 109 overrules *EEOC v. Arabian American Oil Co.*, 111 S. Ct. 1227 (1991), by extending the protections of Title VII to United States citizens working overseas for American companies. Section 112 reverses *Lorance v. AT & T Technologies, Inc.*, 490 U.S. 900 (1989), which held that the period for challenging an allegedly discriminatory seniority rule begins when the rule is adopted. Section 112 allows employees to challenge a seniority system "when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system." Section 113 reverses *West Virginia University Hosps., Inc. v. Casey*, 111 S. Ct. 1138 (1991), by permitting recovery of expert fees as part of the attorney's fee award. Section 114, at issue in this case, overrules *Library of Congress v. Shaw*, 478 U.S. 310 (1986), by providing that federal employees are entitled to all of the remedies available under Title VII, including interest.

³ In *Ayers*, the court considered the retroactivity of the Civil Rights Restoration Act of 1987. The Act's explicitly stated purpose was to overturn the Supreme Court's decision in *Grove City College v. Bell*, 465 U.S. 555 (1984), which limited the scope of Title IX. The Act was silent as to whether it was to be applied retroactively. The court held that the Act should apply to cases which were pending at the time of its enactment. *Ayers*, 893 F.2d at 754-56. *See also Lussier v. Dugger*, 904 F.2d 661, 665-66 (11th Cir. 1990); *Stender*, 780 F. Supp. at 1306.

Court cases overruled by the Act, the discriminatory conduct at issue was on average nearly nine years old by the time the case reached the Court, and four of those cases were remanded for further proceedings.⁴ We would seriously undermine Congress' stated intent were we to hold that the decisions it repudiated would live on in the federal courts for another nine years.

In sum, we give proper effect to the language of the Civil Rights Act of 1991 by applying it to cases that were pending at the time of its enactment. We thus conclude that the Act entitles Reynolds to receive interest on her back pay award under the Rehabilitation Act.

B.

In holding as we do, we break ranks with the other circuits that have decided this issue. *See Baynes v. AT & T Technologies, Inc.*, 976 F.2d 1370 (11th Cir. 1992); *Gersman v. Group Health Ass'n, Inc.*, 975 F.2d 886 (D.C. Cir. 1992); *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363 (5th Cir. 1992); *Moze v. American Commercial Marine Serv. Co.*, 963 F.2d 929 (7th Cir.), *cert. denied*, 113 S. Ct. 207 (1992); *Fray v. Omaha World Herald Co.*, 960 F.2d 1370 (8th Cir. 1992); *Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir.), *cert. denied*, 113 S. Ct. 86 (1992). We do so in the conviction that the plain language of the Act compels our result. We part with those decisions because they either rely on an administrative agency interpretation or the legislative history of the Act when they should not look beyond the plain text, or

⁴ The actual average was 8.7 years. *See Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (plaintiff fired in 1982); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (case filed in 1974); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plaintiff denied partnership in 1983); *EEOC v. Arabian American Oil Co.*, 111 S. Ct. 1227 (1991) (plaintiff dismissed in 1974); *Martin v. Wilks*, 490 U.S. 755 (1989) (consent decree entered in 1981, suit filed in 1982); *Lorance v. AT & T Technologies*, 490 U.S. 900 (1989) (seniority system adopted in 1979, plaintiff laid off in 1982); *West Virginia Univ. Hosps. v. Casey*, 111 S. Ct. 1138 (1991) (disputed practice occurred in January 1986); *Library of Congress v. Shaw*, 478 U.S. 310 (1986) (Title VII complaints filed in 1976 and 1977).

because they ignore or misconstrue that dispositive statutory language.

In *Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir. 1992), the Sixth Circuit ignored sections 402(b) and 109(c) in finding the Act prospective. The court grounded its decision in administrative deference to the Equal Employment Opportunity Commission's policy statement supporting the Act's prospective application.⁵ *Id.* at 598. Because we conclude that the plain language of the Act when read in conjunction with basic principles of statutory construction requires us to find that the Act applies retroactively, we need not heed the Equal Employment Opportunity Commission's contrary conclusion. *See Immigration and Naturalization Service v. Cardozo-Fonseca*, 480 U.S. 421, 445-48 (1987) (explaining that when the judiciary employs traditional tools of statutory construction to find clear congressional intent, deference to a contrary administrative finding is inappropriate).

The Eighth Circuit, in *Fray v. Omaha World Herald Co.*, 960 F.2d 1370, 1377, 1378 (8th Cir. 1992), relied on legislative history that it termed "highly probative" and "dispositive" to its alternative holdings under *Bowen and Bradley*. When, as here, the text of the statute reveals its plain meaning as to retroactivity, we need not be concerned with legislative history. *See Kaiser*, 494 U.S. at 835. Although eight members of the Court have recently reaffirmed the propriety of using legislative history as an aid in discerning legislative intent, *see Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476, 2485 n.4 (1991), we need not do so "[w]hen the words of a statute are unambiguous," *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992). We therefore discuss the legislative history only to accentuate our reasons for not joining the other circuits that have considered the retroactivity of the Civil Rights Act of 1991.

⁵ The *Vogel* court ignored *EEOC v. Arabian American Oil Co.*, 111 S. Ct. 1227, 1235 (1991), in which the Supreme Court held that EEOC interpretations of Title VII are not entitled to the same deference as are other agency's interpretations of the statutes they are charged with administering.

Fray found that the legislative history revealed Congress' intent to apply the Act only prospectively: the President vetoed the proposed Civil Rights Act of 1990, in part because it contained an explicit retroactivity provision. *Fray*, 960 F.2d at 1377, 1378. See 136 Cong. Rec. S16,419 (daily ed. Oct. 22, 1990) (President's Message to the Senate Returning Without Approval the Civil Rights Act of 1990). Thus, *Fray* reasoned, because the text of the 1991 Act omitted that provision, Congress must have intended that the 1991 Act apply only prospectively. *Fray*, 960 F.2d at 1377, 1378.

We reject this contention, as did the Seventh Circuit in *Mozee v. American Commercial Marine Serv. Co.*, 963 F.2d 929, 933 (7th Cir. 1992). Although Congress did not adopt the proposed 1990 Act, it also refused to adopt the Bush Administration's proposed bill which, in contrast, contained explicitly prospective language.⁶

As all courts of appeals have found, the remainder of the legislative history is equally ambiguous. The statements and interpretive memoranda of different members of the House and Senate conflict on the issue of retroactivity.⁷ Even the bill's

⁶ Section 14 of the Bush proposal stated: "This Act and the amendments made by this Act shall take effect upon enactment. The amendments made by this Act shall not apply to any claim arising before the effective date of this Act." H.R. 1375, 102nd Cong., 1st Sess. (1991).

⁷ The legislative history regarding the application of the Act to pending cases is rather unusual. No committee or conference reports accompanied the passage of the Act; instead, various members of Congress submitted interpretive memoranda, all of which conflict with one another on the critical question of whether the Act applies to pending cases. See 137 Cong. Rec. S15,472-78 (daily ed. Oct. 30, 1991) (Section-by-Section Analysis of Sen. Dole); 137 Cong. Rec. S15,483-85 (daily ed. Oct. 30, 1991) (Interpretive Memorandum of Sen. Danforth); 137 Cong. Rec. S15,485-86 (daily ed. Oct. 30, 1991) (Statement of Sen. Kennedy); 137 Cong. Rec. S15,952-53 (daily ed. Nov. 5, 1991) (Sen Dole's legislative history on technical amendments); 137 Cong. Rec. S15,963-64 (daily ed. Nov. 5, 1991) (Sen. Kennedy's analysis of technical amendments); 137 Cong. Rec. H9,542-49 (daily ed. Nov. 7, 1991) (Interpretive Memorandum of Rep. Hyde); 137 Cong. Rec. H9,526-32 (daily ed. Nov. 7, 1991) (Section-by-Section Analysis of Rep. Edwards). There is no explicit reference to section 114(2) in the legislative history.

principal sponsors, Senators Danforth and Kennedy, disagreed as to whether the Act should apply to pending cases. See 137 Cong. Rec. S15,483 (daily ed. Oct. 30, 1991) (statement of Sen. Danforth, stating that the Act applies prospectively); 137 Cong. Rec. S15,485 (daily ed. Oct. 30, 1991) (statement of Sen. Kennedy, stating that the Act applies to pending cases). Senator Danforth, however, ultimately conceded that the legislative history was confusing and noted that "a court would be well advised to take with a large grain of salt floor debate and statements placed into the Congressional Record which purport to create an interpretation for the legislation that is before us." 137 Cong. Rec. S15,325 (daily ed. Oct. 29, 1991) (Statement of Sen. Danforth).⁸

In light of the unambiguous text of the Act, we heed Senator Danforth's warning. Cf. Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. Cal. L. Rev. 845, 861-62 (1992) (where the legislative history of a statute is so confusing and contradictory that it is of no use in ascertaining Congress's intent, we should not attempt to use it as a guide.)

The Seventh Circuit, in *Mozee v. American Commercial Marine Serv. Co.*, 963 F.2d 929 (7th Cir. 1992), the Fifth Circuit, in *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363 (5th Cir. 1992), and the D.C. Circuit, in *Gersman v. Group Health Ass'n, Inc.*, 975 F.2d 886 (D.C. Cir. 1992), all noted the potential relevance

⁸ We give little credence to President Bush's statement accompanying his signing of the bill. In this statement, he expressed his agreement with Senator Dole's interpretive memorandum, which stated that the Act would not apply to cases arising before its effective date. See Statement of President George Bush Upon Signing S. 1745, Nov. 21, 1991, reprinted in 1992 U.S.C.C.A.N. 768, 769. It is not the President's place to write federal statutes. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is, emphatically, the province and duty of the judicial department, to say what the law is."); see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) ("In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad."). See *Stender*, 780 F. Supp. at 1305 n.8.

of sections 402(b) and 109(c), but did not find those sections dispositive. None of those cases construed sections 402(b) and 109(c) in light of the qualifying clause of section 402(a).

Moreover, those cases dismissed the importance of sections 402(b) and 109(c) by engaging in unwarranted speculation about Congress' possible motivation in enacting those provisions. See *Moze*, 963 F.2d at 933; *Johnson*, 965 F.2d at 1373; *Gersman*, 975 F.2d at 890. In finding sections 402(b) and 109(c) unilluminating, those circuits surmised that the explicitly prospective provisions might be redundant assurances that those provisions would not be applied retroactively even if the Act as a whole were found to be retroactive. Thus, those sections could be construed as evidencing no congressional intent concerning the retroactivity of the Act in general. "[G]iven the convoluted legislative history of this Act and the war of interests firing at each other across the floor of both legislative houses, one might view these two subsections not as redundancies, but rather as insurance policies." *Gersman*, 975 F.2d at 890.

We disagree. The language of the Act leaves no room for speculation about the motives of certain members of Congress in voting in favor of sections 402(b) and 109(c). If the statutory language of those sections read: "Notwithstanding any judicial construction concerning the retroactivity of this Act in general, this section shall not apply with respect to conduct occurring before the date of enactment of this Act," we would have an entirely different case. But sections 402(b) and 109(c) as actually enacted simply do not read like insurance clauses.

In all probability, some members of Congress believed that sections 402(b) and 109(c), as written, would be construed by the judiciary as insurance clauses, and voted in favor of those clauses accordingly. Other members of Congress probably believed that the language of those sections would compel the judiciary to find that the Act in general applied retroactively, and voted accordingly. We find those individual members' beliefs unimportant, given the clear text of the Act.

In this case, regardless of what individual legislators said on the floor or in their interpretive memoranda, it is what Congress said in the statute that matters. Whatever their individual disagreement over the desirability of applying the Act to pending cases, the legislators as a body enacted a statute that, consistent with established principles of statutory construction, can only be read one way. Supreme Court and Ninth Circuit precedent require that we give effect to Congress' intent as expressed in the plain language of the statute by applying the Act to the case before us. We conclude that Reynolds is entitled to pre and postjudgment interest under the provisions of the Act.

CONCLUSION

We hold that Reynolds is entitled to pre and postjudgment interest under the Civil Rights Act of 1991. The district court's judgment awarding interest is **AFFIRMED**.

APPENDIX B

**ORDER OF THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT**

February 5, 1993

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

February 5, 1993

FONTAINE DAVIS; ERIC H. §
WASHINGTON; JERILYN NORTH, §
JIMMIE BRADEN, AUDREY LEE, §
EARLY DAVIS, BRANDI §
SWANSON, SUSAN §
MOOREHEAD, ANNE YOUNG, §
MARY M. CARDER, THERESA §
RODIGOU, KATHLEEN J. §
BRADSHAW, PATRICIA §
MURRAY, INTERNATIONAL §
ASSOCIATION OF BLACK §
FIREFIGHTERS-SAN FRANCISCO §
CHAPTER, et al., §
Plaintiffs-Appellees, §
v. §
CITY AND COUNTY OF SAN §
FRANCISCO, §
Defendant-Appellant. §

No. 91-15113

D.C. No.
CV-84-01100-MHP

**ORDER DENYING
PETITION FOR
REHEARING AND
VACATING PORTION
OF OPINION**

Before: Alfred T. Goodwin, Betty B. Fletcher and
Melvin Brunetti, Circuit Judges.

ORDER

Plaintiffs-Appellees' petition for rehearing is denied.

However, in light of the parties' settlement of plaintiff-appellees' claims to expert witness fees while the court had under

consideration whether to take en banc the issue of retroactivity of the Civil Rights Act of 1991 which amended 42 U.S.C. § 2000e-5(k) to provide explicitly for the award of expert fees as part of costs, we vacate as moot that portion of the opinion that affirms the district court's award of expert witness fees in this case.

Upon remand to the district court, we direct that, as part of the remand, it vacate that portion of its judgment that awarded expert witness fees. *See United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

APR 30 1993

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
October Term, 1992

BARBARA LANDGRAF,

Petitioner,

vs.

USI FILM PRODUCTS,
BONAR PACKAGING, INC., AND
QUANTUM CHEMICAL CORPORATION,

Respondents.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT**

Joint Appendix

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RELEVANT DOCKET ENTRIES**The United States District Court for the
Eastern District of Texas**

07/21/89	Complaint filed
09/08/89	Answer filed
02/04/91	Trial
05/21/91	Findings of Fact and Conclusions of Law
05/22/91	Judgment
06/06/91	Notice of Appeal

**The United States Court of Appeals for the
Fifth Circuit**

04/29/92	Oral Argument
07/30/92	Opinion; Judgment entered

The United States Supreme Court

10/28/92	Petition for Writ of Certiorari filed
12/30/92	Brief for Respondent filed
02/22/93	Petition for Writ of Certiorari Granted

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

Barbara Landgraf
vs.
USI Film Products, *et al.*

Trial Exhibit 1-4

January, 1986

11-7 Shift

TO ALL EMPLOYEES IN THE FINISHING AND
CONVERTING DEPARTMENTS:

I hope that each and everyone of you that took part in the malicious lies and rumors that you told on me or help to spread will not come back on you some day to hurt you.

The stress that each one of you help to put on me, caused me to leave my job. I hope that each of you can rest easy when you lie down at night and each mouth full of food will go down easily for you! Laugh if you wish and "most of you will."

You see I was trying to help make a living for my family the same as each of you are, but that can be no more. Be careful what you say as your closest friend could turn on you tomorrow and you will be made the outcast.

God be with each of you now as the devil has been your leader so far.

A Former Finishing Dept. Co-worker,

Barbara Landgraf

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

[Title Omitted in Printing]

Trial Exhibit 1-1

Area Code: 214
COM: 214-787-7015
FTS: 729-7015

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
DALLAS DISTRICT OFFICE
8303 ELMBROOK DRIVE
DALLAS, TEXAS 75247

September 15, 1988

CHARGE NO: 310 86 3629

Ms. Barbara Landgraf
408 Audrey
Whitehouse, Texas 75791

CHARGING PARTY

U.S.I. Film Products
(Bonar Packaging, Inc.)
P.O. Box 818
Tyler, Texas 75710

RESPONDENT

DETERMINATION

Under the authority vested in me by the Commission I issue the following determination as to the merits of the subject charge filed under Title VII of the Civil Rights Act of 1964, as amended.

All requirements for coverage have been met. Charging Party alleged that she was discriminated against on the basis of her sex,

female, in violation of Title VII, in that she was sexually harassed by a male-co-worker. Additionally, the Charging Party alleged that she resigned her employment because of Respondent's discriminatory work environment.

Sexual harassment is a violation of Section 703 of Title VII, as amended. Section 1604.11(a) of the Commission's Guidelines on Discrimination Because of Sex (Guidelines), 29 C.F.R. 1604.11(a) (1985), defines sexual harassment as follows:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

The evidence supports Charging Party's allegation that she was subjected to unwelcome physical conduct of a sexual nature by a co-worker and that the conduct created a hostile and offensive working environment in violation of Title VII. Therefore, there is reasonable cause to believe that the Charging Party was sexually harassed, as alleged, in violation of the Act.

In this case, however, following the reported incident, the Respondent promptly transferred the co-worker away from the Charging Party's work area. The Respondent also issued his written discipline and notified him that a single substantiated complaint or report of such conduct at anytime in the future would result in more severe disciplinary action, including discharge. Thus, Respondent provided remedy on its own initiative. Therefore, although the Charging Party was sexually harassed, there is no additional remedy being sought in resolution of this charge.

The investigation revealed no evidence that the Charging Party was sexually harassed after she complained to the Respondent about her co-worker. The evidence indicates that the Charging Party resigned from her employment because she was unable to get along with other co-workers. Therefore, the Commission does not consider the Charging Party's resignation as constructive discharge.

Based upon the analysis above, I have determined the evidence obtained during the investigation does establish a violation of the statute regarding sexual harassment. However, since the Respondent undertook prompt remedial action, the Commission, accordingly, deems that no additional relief is necessary and the sexual harassment issue is hereby considered resolved.

Based upon the analysis above, I have determined the evidence obtained during the investigation does not establish a violation of the statute regarding Charging Party's resignation (constructive discharge).

This determination does not conclude the processing of this charge. If the Charging Party wishes to have this determination reviewed, she must submit a signed letter to the Determinations Review Program which clearly sets forth the reasons for requesting the review and which lists the Charge Number and Respondent's name. Charging Party must also attach a copy of this Determination to her letter. These documents must be personally delivered or mailed (postmarked) on or before September 29, 1988 to the Determinations Review Program, Office of Program Operations, EEOC, 2401 E. Street, N.W., Washington, D.C. 20507. It is recommended that some proof of mailing, such as a certified mail receipt, be secured.

If the Charging Party submits a request by the date shown above, the Commission will review the determination. Upon completion of the review, the Charging Party and Respondent will be issued a final determination which will contain the results of the review and what further action, if any, the Commission may take. The

final determination will also give notice, as appropriate, of the Charging Party's right to sue.

If the Charging Party does not request a review of this determination by September 29, 1988, this determination will become final the following day, the processing of this charge will be complete, and the charge will be dismissed. (This letter will be the only notice of dismissal and the only notice of the Charging Party's right to sue sent by the Commission.) FOLLOWING DISMISSAL, THE CHARGING PARTY MAY ONLY PURSUE THIS MATTER FURTHER BY FILING SUIT AGAINST THE RESPONDENT(S) NAMED IN THE CHARGE IN FEDERAL DISTRICT COURT WITHIN 90 DAYS OF THE EFFECTIVE DATE OF DISMISSAL. Therefore, in the event a request for review is not made, if a suit is not filed by December 16, 1988, the Charging Party's right to sue will be lost. The Commission's regulation governing no cause determination are printed in Title 29, Code of Federal Regulations, Section 1601.19.

On Behalf of the Commission:

(Date)

Marco Salinas
Acting Director

Enclosure: Information Sheet on Filing
Suit in Federal District Court

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

[Title Omitted in Printing]

Trial Exhibit 1-3

U.S. EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
Washington, D.C. 20507

TO: U.S.I. Film Products May 31, 1989
P.O. Box 818
Tyler TX 75710 Charge Number : 310863629

Barbara Landgraf U.S.I. Film Products
Charging Party Respondent

**DETERMINATION ON REVIEW AND DISMISSAL OF
TITLE VII CHARGE**

The Commission has reviewed the investigation of this charge of employment discrimination and all supplemental information furnished. Based upon this review, we agree with the determination issued by our field office and hereby issue a final determination that the evidence obtained during the investigation does not establish a violation of the statute. Therefore, the Commission dismisses and terminates its administrative processing of this charge.

As the charge alleged a Title VII violation, this is notice that if the Charging Party wishes to pursue this matter further, (s)he may do so by filing a private action in Federal District Court against the Respondent(s) named above within 90 days of receipt of this Determination.

IF CHARGING PARTY DECIDES TO SUE, CHARGING PARTY MUST DO SO WITHIN 90 DAYS FROM THE RECEIPT OF THIS DETERMINATION; OTHERWISE THE RIGHT TO SUE IS LOST.

On Behalf of the Commission:

Leonora L. Guarraia
Director
Determinations Review Program

Enclosure: Information Sheet on Filing
Suit in Federal District Court

cc: Jacqueline R. Bradley
District Director
Dallas District Office

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

May 22, 1991

BARBARA LANDGRAF	§	
	§	
VS.	§	CIVIL ACTION
	§	NO. TY-89-435-CA
USI FILM PRODUCTS,	§	
QUANTUM CHEMICAL	§	
CORPORATION and	§	
BONAR PACKAGING, INC.	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to Fed. R. Civ. P. 52(a), the Court enters its Findings of Fact and Conclusions of Law in this action.

I. FINDINGS OF FACT

1. During the course of her employment at USI Film Products ("USI") in Tyler, Texas, Plaintiff Barbara Landgraf ("Landgraf") was subjected to sexual harassment. The sexual harassment consisted of continuous and repeated inappropriate verbal comments and physical contact, the source of which was a fellow employee named John Williams.

2. Landgraf reported the sexual harassment to her immediate supervisor, Bobby Martin, on several occasions.

3. Martin took no actions reasonably calculated to halt the harassment.

4. Landgraf eventually reported the harassment to Sam Forsgard, who handled personnel matters at USI.

5. Forsgard immediately conducted an appropriate investigation into the allegations. Interviews with other female

employees substantiated Landgraf's complaints of sexual harassment by John Williams. After a hearing on the harassment with Williams, he was transferred to another department as a remedial measure.

6. The remedial measures instituted by Forsgard alleviated the harassment Landgraf was subjected to by Williams.

7. Shortly after Forsgard instituted remedial measures regarding the harassment, Landgraf resigned her employment at USI.

8. Landgraf experienced difficulty in getting along with her co-workers. This situation was unrelated to the sexual harassment by John Williams.

9. As evidenced by the language in her resignation letter, Landgraf's motivation for quitting her employment with USI was the conflicts and unpleasant relationships she had with her co-workers.

10. Landgraf suffered mental anguish as a result of the sexual harassment she was subjected to while working at USI.

II. CONCLUSIONS OF LAW

1. A plaintiff must establish five elements in order to state a prima facie case of sexual harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), *et seq.*:

- (1) The employee belongs to a protected group;
- (2) The employee was subject to unwelcome sexual harassment;
- (3) The harassment complained of was based on sex;
- (4) The harassment complained of affected a "term, condition or privilege of employment"; and,
- (5) *Respondeat superior*, i. e., that the employer knew or should have known of the harassment in question and failed to take prompt remedial action.

Waltman v. International Paper Co., 875 F.2d 468, 477 (5th Cir. 1989).

2. Landgraf was subjected to harassment sufficiently severe to alter the conditions of Landgraf's employment and create an abusive working environment sufficient to support Landgraf's "hostile environment" claim. See *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986).

3. Bobby Martin held a management position over Landgraf as her immediate supervisor. Landgraf's complaints to Martin constituted actual notice of the harassment to Landgraf's employer, USI. See *Waltman*, 875 F.2d at 478.

4. Because of Martin's repeated failure to take action when Landgraf reported the harassment to him, USI failed to take prompt remedial action to alleviate the sexual harassment to which Landgraf was subjected.

5. The evidence establishes a prima facie case that Landgraf suffered sexual harassment in violation of Title VII.

6. Landgraf was not constructively discharged from her employment with USI. In order to find that Landgraf was constructively discharged as a result of the sexual harassment, the discriminatory working conditions must have been so difficult or unpleasant that a reasonable person in Landgraf's position would have felt compelled to resign. *Borque v. Powell Electrical Manufacturing Co.*, 617 F.2d 61, 65 (5th Cir. 1980).

Although the harassment was serious enough to establish that a hostile work environment existed for Landgraf, it was not so severe that a reasonable person would have felt compelled to resign. This is particularly true in light of the fact that at the time Landgraf resigned from her job, USI had taken steps through Sam Forsgard to eliminate the hostile working environment arising from the sexual harassment. Landgraf voluntarily resigned from her employment with USI for reasons unrelated to the sexual harassment in question.

7. The Court must now decide the issue of whether Landgraf is entitled to any recovery under Title VII in light of the

determinations that Landgraf suffered from sexual harassment during her employment but that such harassment did not result in her discharge or termination, constructive or otherwise. Although the Fifth Circuit has not ruled on this exact point, it has been suggested in *dicta* that in such a situation nominal damages might be awarded as a remedy which would carry with it the awarding of attorney's fees and costs. *Joshi v. Florida State University*, 646 F.2d 981, 991 n. 33 (5th Cir. 1981). At least one other circuit has held that a plaintiff who establishes a prima facie case of sexual harassment can recover damages without a finding that she was discharged. *See Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900, 905 (11th Cir. 1988).

The statutory language of Title VII provides that "the court may . . . order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement . . . , back pay . . . , or any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g). The Seventh Circuit has noted that "[s]ince damages are not equitable relief, most courts have held that damages are not available to redress violations of Title VII that do not result in discharge." *Bohen v. City of East Chicago, Indiana*, 799 F.2d 1180, 1184 (7th Cir. 1986) (and cases cited therein).

The Court agrees with the Seventh Circuit's conclusion in *Bohen*:

We believe the better view, in accord with the majority of decisions, is that no damages are available under Title VII. If Congress wishes to amend the provisions of Title VII to provide a remedy of damages, it can do so. Until then, this court may only enforce the statute as written, and as currently written Title VII does not contemplate damages.

Id.

The Court finds that Landgraf is not entitled to equitable relief because her employment was not terminated in violation of Title VII. The Court further finds that Landgraf is not entitled to recover damages under 42 U.S.C. § 2000e-5(g).

8. Landgraf has conceded that her pendent state claims for intentional and negligent infliction of emotional distress are barred by the applicable statute of limitations.

Accordingly, IT IS ORDERED that Plaintiff's pendent state claims are DISMISSED with prejudice.

9. Costs shall be paid by the party incurring the same.

SIGNED this 20th day of May, 1991.

ROBERT M. PARKER, CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

Entered May 22, 1991

BARBARA LANDGRAF	§	
	§	
VS.	§	CIVIL ACTION
	§	NO. TY-89-435-CA
USI FILM PRODUCTS,	§	
QUANTUM CHEMICAL	§	
CORPORATION and	§	
BONAR PACKING, INC.	§	

JUDGMENT

IT IS ORDERED that Plaintiff Barbara Landgraf take nothing against Defendants USI Film Products, Quantum Chemical Corporation and Bonar Packaging, Inc.

SIGNED this 20th day of May, 1991.

ROBERT M. PARKER, CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

Filed June 6, 1991

BARBARA LANDGRAF	§	
	§	
Plaintiff	§	
	§	
v.	§	CIVIL ACTION NO:
	§	TY-89-435-CA
USI FILM PRODUCTS,	§	
ET AL.	§	
	§	
Defendants	§	
	§	

NOTICE OF APPEAL

Notice is hereby given that Plaintiff Barbara Landgraf hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final Judgment and the Findings of Fact and Conclusions of Law entered in this action on the 20th day of May, 1991.

Respectfully submitted,

Stuckey & Garrigan
P.O. Box 631902
Nacogdoches, Texas 75963-1902
(409) 560-6020, Fax: (409) 560-9578

BY: _____
Timothy B. Garrigan
Bar Card No. 07703600

CERTIFICATE OF SERVICE

I hereby certify that I have mailed a true and correct copy of the foregoing Notice of Appeal to defendants' attorneys:

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on this the 5th day of June, 1991.

Timothy B. Garrigan

**UNITED STATES COURT OF APPEALS,
FOR THE FIFTH CIRCUIT**

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February 6, 1992

Honorable Gilbert F. Ganucheau
United States Court of Appeals
600 Camp Street, Room 100
New Orleans, Louisiana 70130

RE: *Landgraf v. USI Film Products, et al.*
No. 91-4485

Dear Mr. Ganucheau:

Recent amendments to Title VII, 42 U.S.C. §2000e *et seq.*, contained in the Civil Rights Act of 1991 may bear on the issues before the Court in the above referenced matter. The Civil Rights Act of 1991 has become law since the briefs of the parties were filed.

Please bring this matter to the Court's attention. Thank you for your assistance in this matter.

Sincerely,

Timothy B. Garrigan

TBG/tt

cc: Mike Hatchell
Tracy Crawford
David N. Shane
Roger W. Anderson

No. 91-4485

UNITED STATES COURT OF APPEALS,
FOR THE FIFTH CIRCUIT

July 30, 1992

Barbara LANDGRAF,
Plaintiff-Appellant,

v.

USI FILM PRODUCTS, Bonar Packaging, Inc., and
Quantum Chemical Corporation,
Defendants-Appellees.

Timothy B. Garrigan, Stuckey & Garrigan, Nacogdoches, Tex., for plaintiff-appellant.

Gregory D. Smith, Mike A. Hatchell, Ramey, Flock, Jeffus, Crawford, Harper & Collins, Tyler, Tex., for Bonar, USI, Quantum.

Appeal from the United States District Court for the Eastern District of Texas.

Before GOLDBERG, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Barbara Landgraf brought suit against her employer asserting sexual harassment and retaliation claims under Title VII. After a bench trial, the district court entered judgment in favor of the defendants. Although the district court found that sexual harassment had occurred, it concluded that Landgraf had not been constructively discharged and therefore was not entitled to any relief under Title VII. Landgraf asserts on appeal that the district court clearly erred in finding that she was not constructively

discharged and that the district court erred in failing to make factual findings on her retaliation claim. She also argues that she is entitled to nominal damages even if she is unable to demonstrate a constructive discharge. Finally, she asserts that the damage and jury trial provisions of the Civil Rights Act of 1991 should be applied retroactively to her case. We affirm the district court's judgment in all respects and find that the Civil Rights Act of 1991 does not apply to this case.

I.

Landgraf worked for USI Film Products in its Tyler, Texas production plant on the 11:00 p.m. to 7:00 a.m. shift. From September 1984 to January 1986, she was employed as a materials handler operating a machine which produced several thousand plastic bags per shift. While she worked at the plant, fellow employee John Williams subjected her to what the district court described as "continuous and repeated inappropriate verbal comments and physical contact." The district court found that this sexual harassment was severe enough to make USI a "hostile work environment" for purposes of Title VII liability. The harassment was made more difficult for Landgraf because Williams was a union steward and was responsible for repairing and maintaining the machine Landgraf used in her work.

Landgraf told her supervisor, Bobby Martin, about Williams' harassment on several occasions but Martin took no action to prevent the harassment from continuing. Only when Landgraf reported the harassment to USI's personnel manager, Sam Forsgard, was Williams' behavior investigated. By interviewing the other female employees at the plant, the investigation found that four women corroborated Landgraf's reports of Williams' engaging in inappropriate touching and three women reported verbal harassment.

Williams denied the charges, contending that "they are all lying." Williams was given a written reprimand for his behavior, but was not suspended, although the written policies of USI list sexual harassment as an action "requiring suspension or dismissal." He was technically transferred to another department,

however, USI officials conceded that he would still be in Landgraf's work area on a regular basis. This transfer was not a form of discipline against Williams; as soon as Landgraf resigned he was transferred back to the original department.

The investigation dealt not only with Williams' behavior but also involved questioning employees about their relationship with Landgraf. On January 13, 1986, Forsgard, Wilson, and Martin met with Landgraf. According to Wilson's notes describing the meeting, Forsgard first told Landgraf that her claim had been investigated and that USI had taken the action it deemed appropriate. The meeting then turned to focus on Landgraf's problems in getting along with her co-workers. She was told that she was very unpopular and was "among [her] own worst enemies." When Landgraf asked whether anything was going to happen to Williams she was told that USI had taken what it considered appropriate action and to notify them if Williams attempted to take revenge.

After working just two more shifts, Landgraf left her job at USI. She left a letter addressed to her colleagues stating that "the stress that each one of you help [sic] to put on me, caused me to leave my job." The letter did not refer to the sexual harassment or to Williams by name. Approximately two days later, Landgraf spoke to her supervisor about her decision to resign and specifically attributed it to the harassment by Williams.

II.

It is uncontested that Barbara Landgraf suffered significant sexual harassment at the hands of John Williams during her employment with USI. This harassment was sufficiently severe to support a hostile work environment claim under Title VII. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986). She reported this harassment to her employer through supervisor Bobby Martin on several occasions and no corrective action was timely taken.

Because Landgraf voluntarily left her employment at USI, however, she must demonstrate that she was constructively

discharged in order to recover back pay as damages. In order to demonstrate constructive discharge, she must prove that "working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." *Bourque v. Powell Electrical Mfg. Co.*, 617 F.2d 61, 65 (5th Cir. 1980); *Jurgens v. EEOC*, 903 F.2d 386, 390-91 (5th Cir. 1990). The district court found that the sexual harassment by Williams was not severe enough that a reasonable person would have felt compelled to resign. This conclusion was strengthened by the district court's finding that at the time Landgraf resigned USI was taking action reasonably calculated to alleviate the harassment. The district court further found that "as evidenced by the language in her resignation letter, Landgraf's motivation for quitting her employment with USI was the conflicts and unpleasant relationships she had with her co-workers."

Landgraf argues first that the district court clearly erred in finding that USI had taken steps reasonably calculated to end the harassment. We disagree. Our review of the district court's factual finding is limited. As the Supreme Court has recently described the scope of our review: "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson v. Bessemer City*, 470 U.S. 564, 573-74, 105 S.Ct. 1504, 1511-12, 84 L. Ed.2d 518 (1985). There was evidence that USI had given Williams its most serious form of reprimand and acted to reduce his contact with Landgraf at the workplace. Landgraf testified that Williams continued to harass her after his reprimand, however, she did not report these incidents to USI before resigning. Title VII does not require that an employer use the most serious sanction available to punish an offender, particularly where, as here, this was the first documented offense by an individual employee. The district court did not clearly err in concluding that USI took steps reasonably calculated to end the harassment.

Landgraf argues that the finding of no constructive discharge was clearly erroneous. We disagree. The district court, after

hearing all the testimony in this case, concluded that Landgraf resigned for reasons unrelated to sexual harassment. The evidence in this case presented two possible reasons for Landgraf's decision to resign: problems with her co-workers, as evidenced by her note on sexual harassment as stated in conversation with Bobby Martin. Landgraf testified at trial that the sexual harassment was the reason for her resignation. She also stated that the reference to "the devil [who] has been your leader so far" in her resignation note was actually a reference to Williams. The district court concluded based upon this testimony and the note itself that the problems with her co-workers actually caused her resignation. Given these two plausible interpretations of the evidence, we must affirm the district court's finding. Landgraf also asserts that the conflicts she had with her co-workers were as a result of her problems with Williams. There was conflicting evidence on this question and the district court specifically found that Landgraf's conflict with her co-workers was unrelated to the sexual harassment by Williams. The district court did not clearly err in finding that Landgraf left her employment at USI for reasons unrelated to sexual harassment.

Moreover, even if the reason for Landgraf's departure was the harassment by Williams, the district court found that, particularly in light of the corrective actions taken by USI immediately before Landgraf resigned, the level of harassment was insufficient to support a finding of constructive discharge. To prove constructive discharge, the plaintiff must demonstrate a greater severity or pervasiveness of harassment than the minimum required to prove a hostile working environment. *Pittman v. Hattiesburg Municipal Separate School District*, 644 F.2d 1071, 1077 (5th Cir. 1981) (constructive discharge requires "aggravating factors"). The harassment here, while substantial, did not rise to the level of severity necessary for constructive discharge. Although USI's investigation of this incident may not have been overly sensitive to Landgraf's state of mind, the company had taken steps to alleviate the situation and told Landgraf to let them know of any further problems. A reasonable employee would not have felt compelled to resign immediately following the institution of measures which the district court found to be reasonably

calculated to stop the harassment. We cannot say that the district court clearly erred in rejecting the claim of constructive discharge.

III.

Landgraf asserts that the district court erred in failing to make findings of fact and conclusions of law with regard to her retaliation claim against USI. USI argues that no findings on the retaliation claim are necessary because Landgraf failed to prevail on her claim of constructive discharge. We agree.

An adverse negative employment action is a required element of a retaliation claim. *Collins v. Baptist Memorial Geriatric Center*, 937 F.2d 190, 193 (5th Cir. 1991). The only possible adverse employment action that Landgraf suffered after she complained to Martin about the sexual harassment would be the alleged constructive discharge. Because the district court found that the reason Landgraf resigned her position was her trouble getting along with her co-workers, she cannot prove constructive discharge on the basis of retaliation. As noted above, Landgraf asserts that her troubles with her co-workers were as a result of her complaints about Williams' harassment. However, the district court explicitly found to the contrary and we cannot say that that finding was clearly erroneous. Accordingly, Landgraf's retaliation claim cannot prevail because she suffered no adverse employment action as a result of her complaints. *Collins*, 937 F.2d at 193.

IV.

Landgraf argues that even if she fails to demonstrate that she was constructively discharged, she may still be awarded nominal damages which would carry with them an award of attorneys' fees. We recognize that some confusion may have arisen from our statement in *Joshi v. Florida State Univ.*, 646 F.2d 981, 991 n.3 (5th Cir. Unit B 1981), indicating in dicta that in some cases an employee who suffered from illegal discrimination but was ineligible for back pay might be entitled to nominal damages. Several circuit courts have explicitly held that such nominal

damages are available under Title VII in some cases. *Huddleston v. Roger Dean Chevrolet*, 845 F.2d 900, 905 (11th Cir. 1988); *Baker v. Weyerhaeuser Co.*, 903 F.2d 1342 (10th Cir. 1990). See also *Katz v. Dole*, 709 F.2d 251, 253 n.1 (4th Cir. 1983); *T & S Service Associates v. Crenson*, 666 F.2d 722, 728 n.8 (1st Cir. 1981). Only the Seventh Circuit has directly rejected the award of nominal damages as relief in Title VII cases. *Bohen v. City of East Chicago, Indiana*, 799 F.2d 1180, 1184 (7th Cir. 1986).

We conclude that the *Bohen* court's rejection of nominal damages as a Title VII remedy is the correct interpretation of the statutory scheme.¹ Title VII provides that where a court finds that an employer has engaged in unlawful employment practices, it may order action "which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay, . . . or any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g). We have consistently interpreted this provision to mean that "only equitable relief is available under Title VII." *Bennett v. Corroon & Black Corp.*, 845 F.2d 104, 106 (5th Cir. 1988). Nominal damages such as those awarded in *Huddleston* and *Baker* are legal, not equitable relief and are therefore outside the scope of remedies available under Title VII. *Bohen*, 799 F.2d at 1184 (damages unavailable to redress Title VII violations that do not result in discharge).

Landgraf also asserts that she is entitled to equitable relief in the form of a declaratory judgment, relying on the Eighth Circuit's opinion in *Bibbs v. Block*, 778 F.2d 1318 (8th Cir. 1985). We conclude that no declaratory judgment is appropriate in this case. The purpose of equitable relief under Title VII is "to restore the victim of discrimination to fruits and status of employments as if there had been no discrimination." *Bennett*, 845 F.2d at 106. Here, because Landgraf voluntarily left her employment she was not deprived of any fruits of employment

¹ We note, of course that under the amendments to Title VII in the Civil Rights Act of 1991, remedies will no longer be limited to equitable relief. However, for the reasons discussed below, those amendments do not apply to this case.

as a result of the sexual harassment. Her argument that she is entitled to a declaratory judgment for purposes of vindication because she prevailed on the issue of whether sexual harassment occurred must also fail. See *LaBoeuf v. Ramsey*, 503 F.Supp. 747 (D. Mass. 1980) (allowing declaratory judgment for purposes of vindication). USI did not dispute at trial the fact of Landgraf's sexual harassment. The only issues disputed were the propriety of USI's reaction to the harassment and Landgraf's reason for resigning. Landgraf did not prevail on either of these issues and the district court did not err in refusing to grant a declaratory judgment.

V.

Finally, we address the question of whether any provisions of the Civil Rights Act of 1991 apply to this case. Two provisions of the Act would affect this case if applicable: the addition of compensatory and punitive damages and the availability of a jury trial. Civil Rights Act of 1991, Pub.L. No. 102-166, §§ 102(a)(1), 102(c), 105 Stat. 1072-73 (1991).

We recently addressed the issue of the Act's retroactivity in *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363 (5th Cir. 1992), where we joined the other circuit courts which have ruled on the issue in holding that § 101(2)(b) of the Act does not apply to conduct occurring before the effective date of the Act. See *Luddington v. Indiana Bell Telephone Co.*, 966 F.2d 225 (7th Cir. 1992); *Fray v. Omaha World Herald Co.*, 960 F.2d 1370 (8th Cir. 1992); *Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir. 1992). We need not repeat here our discussion of the legislative history of the Act. For the reasons explained in *Johnson*, we conclude that there is no clear congressional intent on the general issue of the Act's application to pending cases. We must therefore turn to the legal principles applicable to statutes where Congress has remained silent on their retroactivity.

As we noted in *Johnson* the legal principles surrounding the retroactive application of statutes are somewhat uncertain in light of the Supreme Court's decisions in *Bradley v. Richmond School Board*, 416 U.S. 696, 94 S.Ct. 2006, 40 L. Ed. 2d 476 (1974) and

Bowen v. Georgetown University Hospital, 488 U.S. 204, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988). We need not resolve the recognized tension between the *Bradley* and *Bowen* cases, however, in order to resolve the issue facing us here. See *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 837, 110 S.Ct. 1570, 1572, 108 L.Ed.2d 842 (1990). Even under the standard set forth in *Bradley* we conclude that these two provisions of the Act should not be applied retroactively to this case.

The rule set forth in *Bradley* is that a court must "apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley*, 416 U.S. at 711, 94 S.Ct. at 2016. In determining whether retroactive application of a statute will wreak injustice, we consider "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." *Belser v. St. Paul Fire and Marine Ins. Co.*, 965 F.2d 5 (5th Cir. 1992), citing *Bradley*, 416 U.S. at 717, 94 S.Ct. at 2019.

We turn first to the provision allowing either party to request a jury trial. When this case was tried in February 1991, the district court applied the law in effect at that time when it conducted a bench trial on the Title VII claims. We are not persuaded that Congress intended to upset cases which were properly tried under the law at the time of trial. See *Bennett v. New Jersey*, 470 U.S. 632, 105 S.Ct. 1555, 84 L.Ed.2d 572 (1985) (Court would not presume that Congress intended new grant regulations to govern review of prior grants). To require USI to retry this case because of a statutory change enacted after the trial was completed would be an injustice and a waste of judicial resources. We apply procedural rules to pending cases, but we do not invalidate procedures followed before the new rule was adopted. *Belser*, 965 F.2d 5 at 9.

We now turn to whether the Act's provisions for compensatory and punitive damages apply to pending cases. We conclude that they do not. Retroactive application of this provision to conduct occurring before the Act would result in a manifest

injustice. The addition of compensatory and punitive damages to the remedies available to a prevailing Title VII plaintiff does not change the scope of the statute's coverage. That does not mean, however, that these are inconsequential changes in the Act. As Judge Posner notes in *Luddington*, "such changes can have as profound an impact on behavior outside the courtroom as avowedly substantive changes." Unlike allowing prevailing plaintiffs to recover attorneys' fees as in *Bradley*, the amended damage provisions of the Act are a seachange in employer liability for Title VII violations. For large employers, the total of compensatory and punitive damage for which they are potentially liable can reach \$300,000 per claim. Civil Rights Act of 1991, § 102(b)(3).

The measure of manifest injustice under *Bradley* is not controlled by formal labels of substantive or remedial changes. Instead, we focus on the practical effects the amendments have upon the settled expectations of the parties. There is a practical point at which a dramatic change in the remedial consequences of a rule works change in the normative reach of the rule itself. It would be an injustice within the meaning of *Bradley* to charge individual employers with anticipating this change in damages available under Title VII. Unlike *Bradley*, where the statutory change provided only an additional basis for relief already available, compensatory and punitive damages impose "an additional or unforeseeable obligation" contrary to the well-settled law before the amendments. 416 U.S. at 721, 94 S.Ct. at 2021. We conclude that the damage provisions of the Civil Rights Act of 1991 do not apply to conduct occurring before its effective date.

The judgment of the district court is AFFIRMED.

No. 92-757

Supreme Court, U.S.
FILED

APR 30 1993

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
October Term, 1992

BARBARA LANDGRAF,

Petitioner,

vs.

USI FILM PRODUCTS,
BONAR PACKAGING, INC., AND
QUANTUM CHEMICAL CORPORATION,

Respondents.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT**

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April 30, 1993.

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QUESTION PRESENTED

- I. Does the Civil Rights Act of 1991 apply to cases pending when the Act became law so as to entitle petitioner to the full redress provided in section 102 of the Act, where the District Court found and the Court of Appeals for the Fifth Circuit affirmed, that she was the victim of sexual harassment in violation of Title VII, but was not entitled to any relief whatsoever?

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IN THE
Supreme Court Of The United States
 October Term, 1992

BARBARA LANDGRAF,

Petitioner,

vs.

USI FILM PRODUCTS,
 BONAR PACKAGING, INC., AND
 QUANTUM CHEMICAL CORPORATION,

Respondents.

**ON WRIT OF CERTIORARI TO THE
 UNITED STATES COURT OF
 APPEALS FOR THE FIFTH CIRCUIT**

Brief for Petitioner

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported as *Barbara Landgraf v. USI Film Products*, 968 F.2d 427 (5th Cir. 1992), *cert. granted*, 113 S. Ct. 1250 (1993). (Joint Appendix ("J.A.") 19) The United States District Court for the Eastern District of Texas issued Findings of Fact and Conclusions of Law on May 20, 1991. (J.A. 9) Those Findings and Conclusions are unreported. The district court's judgment was entered on May 22, 1991. (J.A. 14)

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1992.

Petitioner filed a petition for writ of certiorari on October 28, 1992. This Court granted certiorari on February 22, 1993. On March 23, 1993, the Office of the Clerk of the Supreme Court of the United States granted an extension of time within which to file a brief on the merits to and including April 30, 1993.

The jurisdiction of this Court rests upon 28 U.S.C. §§ 1254(1) and 2101(c).

STATUTE INVOLVED

This case involves the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991). (Appendix B, attached hereto.) The specific provision at issue in this case is section 102 of the Act.

STATEMENT OF THE CASE

Barbara Landgraf was employed by USI Film Products ("USI")¹ from September 4, 1984, through January 17, 1986. During that period, she was subjected to sexual harassment consisting of continuous and repeated inappropriate verbal comments and physical contact by a fellow employee, John Williams. Several times, Ms. Landgraf reported that harassment to her direct supervisor, Bobby Martin, but to no avail. Martin took no action to stop the harassment. Ms. Landgraf eventually reported the harassment to Sam Forsgard, supervisor of personnel matters. Forsgard conducted an investigation that entailed interviewing numerous female employees of USI. Those women

¹ USI Film Products, which is not a legal entity, is the plant where Barbara Landgraf worked. USI was owned by Quantum Chemical Corporation while Barbara Landgraf worked there. It is now owned by Bonar Packaging, Inc. Prior to trial the parties stipulated that Bonar Packaging, Inc. was the corporate successor in interest.

corroborated Ms. Landgraf's allegations. As a result of that investigation, USI purportedly transferred Williams to another department in the plant; Williams also received a written reprimand. USI conceded, however, that Williams was still in Ms. Landgraf's work area on a regular basis. (J.A. 21) Shortly after Williams was "transferred", Ms. Landgraf resigned from her position at USI.

Ms. Landgraf filed a timely charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). In due course, the EEOC issued a Notice of Right to Sue.

On July 21, 1989, Ms. Landgraf commenced a timely action against USI in the United States District Court for the Eastern District of Texas alleging, among other things, sexual harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* A bench trial was held on February 4, 1991. On May 22, 1991, the district court entered Findings of Fact and Conclusions of Law. The district court found, *inter alia*, that:

- Ms. Landgraf had been subjected to continuous sexual harassment consisting of "continuous and repeated inappropriate verbal comments and physical contact" from John Williams;
- Ms. Landgraf's direct supervisor, Bobby Martin, had taken no action to halt the harassment, even though Ms. Landgraf reported the harassment on several occasions;
- The remedial actions that were eventually instituted after Sam Forsgard's investigation alleviated the harassment;
- Ms. Landgraf resigned because she had difficulty getting along with her co-workers, and that situation was unrelated to sexual harassment; and
- Ms. Landgraf "suffered mental anguish as a result of the sexual harassment she was subjected to while working at USI".

(J.A. 9-10)

In light of the above, the district court concluded, *inter alia*, that:

- Ms. Landgraf was the victim of unlawful sexual harassment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*;
- Ms. Landgraf's complaints to Martin constituted actual notice of the harassment;
- Martin's repeated failure to take action constituted failure on the part of USI to take prompt remedial action to halt the sexual harassment;
- Ms. Landgraf was not constructively discharged within the meaning of *Bourque v. Powell Electrical Manufacturing Co.*, 617 F.2d 61, 65 (5th Cir. 1980); and
- Ms. Landgraf was entitled to no relief whatsoever.

(J.A. 10-12)

The district court's judgment was entered on May 22, 1991. (J.A. 14) Barbara Landgraf timely appealed from that judgment, asserting that the district court erred in finding that USI had taken steps reasonably calculated to end the harassment, and in finding that she had not been constructively discharged. Ms. Landgraf also asserted that the district court erred in failing to make findings of fact and conclusions of law relating to her retaliation claim. In addition, she argued that even if she failed to prove constructive discharge, she was still entitled to nominal damages and equitable relief. Finally, Ms. Landgraf asserted that the compensatory and punitive damages and the jury trial provisions of the Civil Rights Act of 1991 (the "Act") were applicable to her case.²

² The Civil Rights Act of 1991 was signed into law on November 21, 1991, while Ms. Landgraf's appeal was pending. By letter dated February 6, 1992, pursuant to Rule 28(j) of the Rules of the Appellate Procedure, counsel for petitioner requested the clerk of the court to bring the potential applicability

On July 30, 1992, the Court of Appeals for the Fifth Circuit, which had jurisdiction pursuant to 28 U.S.C. § 1291, affirmed the district court's ruling. (J.A. 28) Citing its limited scope of review, the court held that the district court did not clearly err in making its findings and conclusions. (J.A. 22-24) The court likewise rejected Ms. Landgraf's arguments for nominal damages and equitable relief. (J.A. 24-26)

Ms. Landgraf's argument with respect to the applicability of section 102 of the Act was also rejected. (J.A. 26-28) Referring to *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363 (5th Cir. 1992), *petition for cert. filed*, 61 U.S.L.W. 3356 (Sept. 29, 1992) (No. 92-737), in which the Fifth Circuit had held that section 101 of the Act is not applicable to pending cases, the court held that section 102 of the Act likewise is not applicable to such cases. The court determined first, that requiring respondents to retry the case before a jury would be a manifest injustice under the standards of *Bradley v. School Board of Richmond*, 416 U.S. 696 (1974), and a waste of judicial resources, and second, that applying the compensatory and punitive damages provision would be a manifest injustice because it would impose "an additional or unforeseeable obligation" on respondents. (J.A. 27-28)

Thus, the Fifth Circuit held that although Barbara Landgraf was the victim of "uncontested . . . significant sexual harassment", she was left with no remedy whatsoever, because neither the jury trial nor the compensatory and punitive damages sections of the Act could be applied to "conduct occurring before [the Act's] effective date".

SUMMARY OF THE ARGUMENT

Barbara Landgraf suffered significant sexual harassment consisting of continuous and repeated inappropriate verbal comments and physical contact at the hands of a fellow employee. Because Title VII, at the time, did not entitle victims of

of the Act to petitioner's case to the attention of the Court of Appeals for the Fifth Circuit. (J.A. 17)

intentional sexual harassment to damages, and because Ms. Landgraf was unable to prove that the sexual harassment she suffered made working conditions "so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign", *Bourque v. Powell Elec. Mfg. Co.*, 617 F.2d 61, 65 (5th Cir. 1980)(quotations omitted), Ms. Landgraf received no relief whatsoever. The Civil Rights Act of 1991 was intended to remedy this very situation. Under the Act, victims of intentional sexual harassment are now entitled to damages. And, we submit, the plain language of the Act affords that remedy to plaintiffs like Barbara Landgraf whose cases were pending when the Act became law.

To afford the remedy due Ms. Landgraf, this Court need only remand the case for a retrial of the issue of damages for intentional sexual harassment. Respondent did not appeal from the finding of liability for sexual harassment, and petitioner does not seek a trial of the finding on constructive discharge. Thus, in order to decide this case, this Court need not decide whether the Act requires a retrial to a jury in every case that was tried to a judge before the effective date of the Act, but that was still pending before the date of the Act's enactment.

The plain language of the Act is conclusive. Giving effect to every word and phrase of the Act—as rules of statutory construction dictate, *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)—it is clear that section 402(a) together with sections 109(c) and 402(b) establish a rule that, in general, the Act is to be applied to pending cases. Because there is no clear legislative intention to the contrary, this plain language controls. See *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990).

The statutory evolution of the Act confirms that construction. Again, we turn to the rules of statutory construction: where Congress includes limiting language in an early version of a bill and deletes that language before the enactment, it may be presumed that the limitation was not intended. *Russello v. United States*, 464 U.S. 16, 23 (1983). Language that either specifically

revived "dead" cases³ or exempted pending cases was rejected by Congress several times in the course of the evolution of this statute.⁴ Applying rules of statutory construction, we submit that Congress's repeated refusal to limit the Act to prospective application supports our reading of the plain language of the Act.

Even if the plain language did not control, application of judicial presumptions leads inexorably to the same conclusion. A court must apply the law in effect at the time of its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary. *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711 (1974). Applying section 102 of the Act to pending cases does not result in any manifest injustice, and there is no statutory direction or legislative history that precludes application of section 102 of the Act to this case.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE ACT DICTATES THAT THE ACT APPLIES TO PENDING CASES.

A. Analysis of the Question at Issue Must Begin With the Language of the Act.

The question before this Court is whether a statute—the Civil Rights Act of 1991—applies to pending cases. That is a question of statutory construction. As this Court has stated "time and again", "[t]he starting point for interpretation of a statute 'is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, [the statute's] language must ordinarily be regarded as conclusive.'" *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990)(quoting *Consumer*

³ By "dead" cases, we mean cases in which the judgment is final and the time for appeal has expired.

⁴ The 1990 Civil Rights Act specifically applied to both pending cases and final judgments; it was vetoed in part for this reason. We do not contend that the 1991 Act similarly applies to final judgments. It does, however, apply to pending cases.

Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)); see *Patterson v. Shumate*, 112 S. Ct. 2242, 2248 (1992) (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)); *Continental Can Co. v. Chicago Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund*, 916 F.2d 1154, 1157 (7th Cir. 1990) (Easterbrook, J.) ("The text of the statute, and not the private intent of the legislators, is the law It is easy to announce intents and hard to enact laws; the Constitution gives force only to what is enacted.").

B. The Plain Language of the Act Dictates that the Act Applies to Pending Cases.

Three provisions of the 1991 Civil Rights Act explicitly address the Act's applicability to pending cases: sections 402(a), 109(c) and 402(b). Section 402 deals with the Act's effective date, and is the only provision in the Act that generally addresses the Act's applicability to pending cases. Section 402(a) provides that "[e]xcept as otherwise specifically provided, th[e] Act and the amendments made by the Act shall take effect upon enactment". Sections 109(c) and 402(b) both state explicit exceptions to this general rule.

In interpreting these sections, effect must be given to every clause and word in a statute, because "[t]he cardinal principle of statutory construction is to save and not to destroy". *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937)); see also *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("[i]n construing a statute we are obliged to give effect, if possible, to every word Congress used"). This Court reiterated that rule last term: it is a "settled rule" of statutory construction "that a statute must, if possible, be construed in such a fashion that every word has some operative effect". *United States v. Nordic Village, Inc.*, 112 S. Ct. 1011, 1015 (1992); see also *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988) ("we are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law"). Statutory phrases cannot, however, be read in isolation; rather, statutes are to be read as a whole. *United*

States v. Morton, 467 U.S. 822, 828 (1984); *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989).

Thus, to divine the meaning of section 402(a), we must look first to the words in the provision and then interpret those words in the context of the entire statute. The initial clause "except as otherwise provided" is a qualification to the second clause "this Act and the amendments made by this Act shall take effect upon enactment". If that qualification is to have any meaning, it must mean that there are other provisions in the statute that do not "take effect upon enactment". Two such provisions, sections 109(c) and 402(b), are found in the Act. Section 109(c) provides that "[t]he amendments made by this section [regarding American citizens working overseas] shall not apply with respect to conduct occurring before the date of the enactment of this Act".⁵ The language is unequivocal; section 109 does not apply to pre-Act conduct. Section 402(b) provides that "[n]otwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983".⁶ The language in 402(b) is also unequivocal; the dates in 402(b) make clear that the Act does not apply to the litigation falling within its classification. Because both of those sections explicitly provide for prospective application of the Act in certain circumstances, such prospective application is the "exception" to which the qualification in section 402(a) refers. Thus, "take effect upon enactment" must mean that the Act generally applies to pending cases. Otherwise, the qualification is meaningless. See *Estate of Reynolds v. Martin*, 985 F.2d 470, 473 (9th Cir. 1993);

⁵ Section 109 extends the civil rights laws to protect United States citizens working overseas. Because of section 109(c), however, none of these protections apply to pre-Act conduct.

⁶ Because of the specificity of these dates, the effect of section 402(b) is solely to preclude the Act from applying to the Wards Cove Packing Company litigation which is still pending in the Ninth Circuit.

Robinson v. Davis Memorial Goodwill Indus., 790 F. Supp. 325, 327 (D.D.C. 1992) (Sporkin, J.).⁷

Sections 109(c) and 402(b), both of which are explicitly prospective, also demonstrate independently that the Act otherwise applies to pending cases. See *Estate of Reynolds*, 985 F.2d at 473; *Robinson*, 790 F. Supp. at 327. A fundamental principle of statutory construction is that "no provision [of a statute] should be construed to be entirely redundant". *Kungys v. United States*, 485 U.S. 759, 778 (1988); see also *Colautti v. Franklin*, 439 U.S. 379, 392 (1979) (stating the "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative"); *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307-08 (1961) ("[t]he statute admits a reasonable construction which gives effect to all of its provisions. In these circumstances we will not adopt a strained reading which renders one part a mere redundancy"). If the entire Act is inapplicable to

⁷ Section 108 (which amends section 703 of the Civil Rights Act of 1964) contains two additional exceptions to the general rule. As amended, section 703(n)(2)(A) now provides, inter alia,

"[n]othing in the subsection shall be construed to—
alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened". (emphasis added)

This provision requires that challenges to litigated or consent judgments or orders be resolved promptly and in an orderly manner, but provides that section 703(n) does not affect the rights of parties who successfully intervened prior to the Act's enactment. See *Estate of Reynolds*, 985 F.2d at 474 n.1. If the Act did not otherwise apply to pending cases, the second clause of section 703(n) would be meaningless.

Section 703(n)(2)(B), as amended, now provides, inter alia,

"[n]othing in this subsection shall be construed to—
apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government".

This section also precludes application of section 703(n) of the Act to certain pending cases. If the Act did not otherwise apply to pending cases, this section would be meaningless.

pending cases, sections 109(c) and 402(b) are "entirely redundant". See *Estate of Reynolds*, 985 F.2d at 474; *Robinson*, 790 F. Supp. at 327. Sections 109(c) and 402(b) thus provide compelling evidence that the Act is applicable to pending cases.

Several courts of appeal have attempted to avoid those well-established tenets of statutory construction by suggesting that sections 109(c) and 402(b) are simply "insurance policies" inserted to assure that courts could not apply those specific provisions to particular pending cases. See *Butts v. City of New York Dep't of Hous. Preservation and Dev.*, No. 92-7850, 1993 WL 85026, at *11 (2d Cir. Mar. 24, 1993)(collecting cases).⁸ So-called "insurance policies" are not recognized in the rules of statutory construction, however. See *Estate of Reynolds*, 985 F.2d at 478. Not only does the analysis lack foundation in the rules of statutory construction, but the premise of the argument is completely inconsistent with those rules. When the language of a statute is clear, there is no place for speculation about Congress's intentions. See *Estate of Reynolds*, 985 F.2d at 478; *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982).

⁸ Even though the Second Circuit adopted the explanation that sections 109(c) and 402(b) are "insurance policies", it apparently recognized that such a reading of 109(c) and 402(b) is inconsistent with rules of statutory construction. Agreeing with the *Reynolds* court "that it is the duty of reviewing courts to give effect to every clause and word of statute where possible", *Butts*, No. 92-7850, 1993 WL 85026, at *11, the Second Circuit stated that sections 204(b) and 303(b)(4), both of which "require certain things to take place in the future" are the exceptions to which the first clause in 402(a) refers. *Id.* That is simply not so.

Section 204(b) provides that "[n]ot later than 15 months after the date of the enactment of this Act, the Commission shall prepare and submit . . . the findings and conclusions of the Commission". (emphasis added). Section 303(b)(4) provides that "[t]he first Director shall be appointed and begin service within 90 days after the date of enactment of this Act". (emphasis added). Neither of those sections provides for prospective application. Rather, they provide a time frame within which certain events must be completed. Those "events" could occur on the date of the enactment of the Act or sometime after enactment. But whenever those events occur, the provisions of the Act requiring completion of the events clearly "took effect" upon the date of enactment of the Act.

"[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992); see also *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160, 1163 (1993) ("[e]xpressio unius est exclusio alterius")(all omissions shall be understood as exclusions).⁹

C. No Clear Legislative Intent Contradicts the Act's Plain Language.

The plain language of a statute is conclusive, except in the "rare and exceptional circumstances", when a contrary legislative intent is clearly expressed. *Ardestani v. INS*, 112 S. Ct. 515, 520 (1991)(quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)); *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990). Thus, a court should examine the

⁹ A handful of courts have stated that the language of section 102(d) implies that the Act does not apply to pending cases. Section 102(d) defines a "complaining party" as "the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.)". The argument is that the word "may" implies that the Act only applies to those who have yet to bring an action. *Van Meter v. Barr*, 778 F. Supp. 83, 85 (D.D.C. 1991); see also *Thompson v. Johnson & Johnson Management Info. Ctr.*, 783 F. Supp. 893, 895 (D.N.J. 1992), *aff'd*, No. 92-5190 (3d Cir. Mar. 19, 1993); *Joyner v. Monier Room Tile, Inc.*, 784 F. Supp. 872, 876 (S.D. Fla. 1992). That reading is forced at best. There is no difference between the present and future tense of the word "may". In this section, "may" does not indicate tense, rather, it indicates that one is allowed or permitted to do something—bring an action under Title VII. In fact, use of the word "may" "has nothing to do with pending cases, and everything to do with the standing of the parties to invoke the jurisdiction of the federal courts". *Kennedy v. Fritsch*, 796 F. Supp. 306, 310 (N.D. Ill. 1992). The permissive interpretation of the word "may" in section 102(d) is confirmed by the fact that this section amends an existing statute, Title VII. Interpreting "may bring" in the future tense—as applying only to future cases—would result in this section never becoming applicable. In addition, in the context of the statutory scheme of Title VII, it would have made no sense for Congress to have defined a "complaining party" as "a person who may bring, or who has brought" an action, because the statute will apply long after the issue of the Act's applicability to pending cases is resolved.

legislative history only to determine whether a clearly expressed legislative intention contrary to the statutory language exists. See *Bonjorno*, 494 U.S. at 835. The legislative history of the Civil Rights Act of 1991 does not expressly contradict the plain language of the statute.

The Act is the result of a compromise worked out between Senators Edward M. Kennedy and John C. Danforth, the bipartisan sponsors of the bill in the Senate. Both the Senate and the House voted on the compromise bill without returning it to a legislative committee. Thus, there are no committee or conference reports interpreting the final language of the bill. Instead, individual members of Congress introduced a series of interpretive memoranda into the Congressional Record, which conflict with one another on the applicability of the Act to pending cases.¹⁰

The principal sponsors of the Act, Senators Kennedy and Danforth, disagreed regarding the Act's applicability.¹¹ Senator Danforth's interpretive memorandum states that "the provisions of this legislation shall take effect upon enactment and shall not apply retroactively". 137 Cong. Rec. S15485 (daily ed. Oct. 30, 1991). Senator Kennedy responded to that memorandum by

¹⁰ Compare 137 Cong. Rec. S15963-64 (daily ed. Nov. 5, 1991)(statement and interpretive memorandum of Sen. Kennedy) and 137 Cong. Rec. H9530-31 (daily ed. Nov. 7, 1991) (interpretive memorandum of Rep. Edwards) stating that the Act applies to pending cases with 137 Cong. Rec. S15478 (daily ed. Oct. 30, 1991)(interpretive memorandum of Sen. Dole, et al.), 137 Cong. Rec. S15483 (daily ed. Oct. 30, 1991)(interpretive memorandum of Sen. Danforth) and 137 Cong. Rec. H9548 (daily ed. Nov. 7, 1991)(interpretive memorandum of Rep. Hyde) stating that the Act only applies to future cases.

¹¹ The statements of an Act's sponsors are generally given substantial weight in interpreting the Act. See *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951). "The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt." *Id.*; see also *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982)(remarks of the "sponsor of the language ultimately enacted . . . are an authoritative guide to the statute's construction").

stating that a restorative law—such as the Civil Rights Act of 1991—should be applied to pending cases, especially when it involves procedures and remedies.

“It will be up to the courts to determine the extent to which the bill will apply to cases and claims that are pending on the date of enactment. Ordinarily, courts in such cases apply newly enacted procedures and remedies to pending cases. . . . And where a new rule is merely a restoration of a prior rule that had been changed by the courts, the newly restored rule is often applied retroactively, as was the case with the Civil Rights Restoration Act of 1988.”

137 Cong. Rec. S15485 (daily ed. Oct. 30, 1991). The statements of the legislators on the 1991 Civil Rights Act are thus inconclusive regarding its applicability to pending cases.¹² Because there is no “clearly expressed legislative intention” contrary to the plain language, the plain language controls. *United States v. James*, 478 U.S. 597, 606 (1986); cf. *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 748 n.14 (1989) (“Strict adherence to the language and structure of the Act

¹² With the exception of the Eighth Circuit, in *Fray v. Omaha World Herald Co.*, 960 F.2d 1370, 1378 (8th Cir. 1992), every court of appeals to consider the question has held that the legislative history is inconclusive. See, e.g., *Butts v. City of New York Dep’t of Hous. Preservation & Dev.*, No. 92-7850, 1993 WL 85026, at *9 (2d Cir. Mar. 24, 1993) (“We agree that the legislative history is ambiguous.”); *Johnson v. Uncle Ben’s, Inc.*, 965 F.2d 1363, 1373 (5th Cir. 1992) (“Legislative history . . . sheds little light on whether the Act should apply to pre-enactment conduct.”), petition for cert. filed, 61 U.S.L.W. 3356 (Sept. 29, 1992) (No. 92-737); *Vogel v. City of Cincinnati*, 959 F.2d 594, 598 (6th Cir.) (“The legislative history does not provide any guidance on this question [of retroactivity].”), cert. denied, 113 S. Ct. 86 (1992); *Luddington v. Indiana Bell Tel. Co.*, 966 F.2d 225, 227 (7th Cir. 1992) (“The floor debates on the 1991 act reveal . . . divergent views on these questions [concerning retroactivity]. . . . [T]he contenders could not agree, so they dumped the question into the judiciary’s lap without guidance.”), petition for cert. filed, 61 U.S.L.W. 3446 (Dec. 3, 1992) (No. 92-977); *Mozee v. American Commercial Marine Serv. Co.*, 963 F.2d 929, 934 (7th Cir.) (“A clear indication of congressional intent cannot be deciphered from the legislative history . . .”), cert. denied, 113 S. Ct. 207 (1992).

is particularly appropriate where, as here, a statute is the result of a series of carefully crafted compromises.”). Accordingly, this Court should adhere to the plain language and find that the Act, including section 102, applies to pending cases.

II. THE STATUTORY EVOLUTION OF THE ACT SUPPORTS APPLICATION OF THE ACT TO PENDING CASES.

The statutory evolution of the Act provides further support for our reading of the plain language of the Act. See *Russello v. United States*, 464 U.S. 16, 23-24 (1983). Ignoring critical events in the statutory evolution of the Act, the Eighth Circuit held that the enactment history of the Act was “dispositive” of a Congressional intent not to apply the Act to pending cases. *Fray v. Omaha World Herald Co.*, 960 F.2d 1370, 1378 (8th Cir. 1992). That analysis is flawed. The Eighth Circuit overlooked certain critical events in its analysis of the evolution of the Act. See *Butts v. City of New York Dep’t of Hous. Preservation & Dev.*, No. 92-7850, 1993 WL 85026, at *8 (2d Cir. Mar. 24, 1993) (*Fray’s* analysis “is undermined by complicating facts”); *Mozee v. American Commercial Marine Serv. Co.*, 963 F.2d 929, 933-34 (7th Cir.) (same), cert. denied, 113 S. Ct. 207 (1992). Indeed, analysis of the statutory evolution of the provisions addressing the Act’s applicability to pending cases supports application of the Act to pending cases.¹³ See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 431-37 (1968) (tracing enactment history of Civil Rights Act of 1866).

In holding the 1991 Civil Rights Act inapplicable to pending cases, the Eighth Circuit in *Fray* focused on President Bush’s

¹³ Here we draw a distinction between the statements of individual legislators and the actions of Congress as a whole. No Congressional intent can be divined from tallying up the statements in floor debates made by individual legislators or even by the two sponsors of this legislation. See *Butts*, No. 92-7850, 1993 WL 85026, at *7. The actions that Congress took as a whole in passing the Act, however, are illustrative. In interpreting legislation, courts should look at the actions of Congress as a whole, not the actions of individual legislators. See *United States v. Public Utils. Comm’n of Cal.*, 345 U.S. 295, 319 (1953) (Jackson, J., concurring).

veto of the 1990 Civil Rights Act. The 1990 Act specifically applied to both pending cases and final judgments, and was thus "purely retroactive".¹⁴ Because the 1990 Act, with its clear retroactivity language, was vetoed, the Eighth Circuit held that the 1991 Act, absent such language, is not retroactive. The court, however, did not focus on the fact that the 1990 Act provided that final judgments could be vacated; in fact, it was vetoed in part for that reason. The 1991 Act, by contrast, does not provide for vacating final judgments. The *Fray* court also ignored the fact that Congress rejected language, proposed by the President, that specifically exempted pending claims from the reach of the 1991 Act. See 137 Cong. Rec. H3898 (daily ed. June 4, 1991). "Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Russello v. United States*, 464 U.S. at 23-24 (citing *Arizona v. California*, 373 U.S. 546, 580-81 (1963)). Congress's action in removing that limiting language supports application of the Act to pending cases.

A. The Civil Rights Act of 1990.

The language and intended reach of the Civil Rights Act of 1991 can perhaps be more clearly understood against the backdrop of the failed Civil Rights Act of 1990. The 1990 Act expressly provided for pure retroactive application. Like the current Act, the 1990 Civil Rights Act would have overruled several Supreme Court decisions. Each provision of the 1990 Act

¹⁴ Much confusion has resulted from the indiscriminate use of the word "retroactive". This Court has defined a retroactive or retrospective law as a "statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability". *Sturges v. Carter*, 114 U.S. 511, 519 (1885). Application of a new law to a pending case is not "retroactive", unless the application impairs vested rights. See *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 864-65 (1990) (White, J., dissenting) (true retroactivity involves "the application of a change in law to overturn a judicial adjudication of rights that has already become final"). Thus, technical, or pure, retroactivity refers only to applying new laws which impair vested rights—such as vacating final judgments by reviving dead cases.

overruling a Court decision was made expressly applicable on the date of the Supreme Court decision overruled by that provision.¹⁵ Thus, the 1990 Act explicitly applied to pending cases. But the 1990 Act went much further and was also purely retroactive in the sense that it set forth "transition rules" that allowed final

¹⁵ The 1990 Civil Rights Act provided that:

"(1) Section 4 [restoring the burden of proof in disparate impact cases] shall apply to all proceedings pending on or commenced after June 5, 1989 [the date of *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)];

(2) Section 5 [clarifying prohibition against impermissible consideration of race, color, religion, sex, or national origin in employment practices] shall apply to all proceedings pending on or commenced after May 1, 1989 [the date of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)];

(3) Section 6 [facilitating prompt and orderly resolution of challenges to employment practices implementing litigated or consent judgments or orders] shall apply to all proceedings pending on or commenced after June 12, 1989 [the date of *Martin v. Wilks*, 490 U.S. 755 (1989)];

(4) Section 7(a)(1), 7(a)(3) and 7(a)(4), 7(b) [statutes of limitations], 8 [damages], 9 [attorney's fees], 10 [actions against federal government], and 11 [rules of construction] shall apply to all proceedings pending on or commenced after the date of enactment of this Act;

(5) Section 7(a)(2) [statute of limitations] shall apply to all proceedings pending on or commenced after June 12, 1989 [the date of *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989)]; and

(6) Section 12 [restoring prohibition against all racial discrimination in the making and enforcement of contracts] shall apply to all proceedings pending on or commenced after June 15, 1989 [the date of *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989)]."

S. 2104, 101st Cong., 2d Sess. § 15(a) (1990) (Senate version of the 1990 Civil Rights Act).

judgments and orders in "dead" cases to be vacated "if justice require[d]".¹⁶ Specifically, the 1990 Act provided that

"any final judgment entered prior to the date of the enactment of this Act as to which the rights of any of the parties thereto have become fixed and vested, where the time for seeking further judicial review of such judgment has otherwise expired . . . shall be vacated in whole or in part if justice requires"

S. 2104, 101st Cong., 2d Sess. § 15(b)(3)(1990). In contrast, the Bush Administration attempted to make the Act purely prospective, proposing an amendment to the 1990 Act explicitly exempting pending cases by replacing the application dates and transition rules with the following language:

"This Act and the amendments made by this Act shall take effect on the date of the enactment of this Act. . . . The Amendments made by this Act shall not apply with respect to claims arising before the date of enactment of this Act."

136 Cong. Rec. H6747 (daily ed. Aug. 3, 1990)(Michel-LaFalce amendment). That proposal was defeated by a vote of 238 to 188. 136 Cong. Rec. H6768 (daily ed. Aug. 3, 1990)(Michel-LaFalce amendment rejected).

¹⁶ The Joint Conference Report states that the provision was necessary for the following reason:

"The Supreme Court decisions overturned by this bill repudiated well-settled case law which protected American workers against employment discrimination. In the past year, hundreds of discrimination victims have had their claims dismissed, or their rights and remedies otherwise impaired, as a direct result of the application of these decisions. Both the Senate Bill and the House Amendment provide for the application of this legislation to claims which are pending (or as to which the time for appeal has not yet run) on the date of enactment. Nevertheless, other claims may have been resolved by the entry of a final judgment as to which the time for appeal has run prior to the date of enactment. This latter group of claims may only be revived by a mechanism such as that provided by [this provision]."

136 Cong. Rec. H8049 (daily ed. Sept. 26, 1990)(joint explanatory statement of the Conference Committee).

On October 22, 1990, President Bush vetoed the 1990 Civil Rights Act, and Congress failed to override the veto. President Bush's veto message listed the Act's "unfair retroactivity rules" as one of the reasons for his veto. See 136 Cong. Rec. S16418-19 (daily ed. Oct. 22, 1990)(veto message of President Bush).¹⁷ Congress immediately began drafting a new civil rights act.

B. The Civil Rights Act of 1991.

The original version of the 1991 Act contained the same application scheme as the vetoed 1990 Act; it permitted vacating final judgments and reviving dead cases. The Administration proposed amendments in the Senate and the House, both of which exempted pending claims from the Act. The Administration proposals consisted of two sentences:

"This Act and the amendments made by this Act shall take effect upon enactment. *The Amendments made by this Act shall not apply to any claim arising before the effective date of this Act.*" (emphasis added)

137 Cong. Rec. S3023 (daily ed. Mar. 12, 1991)(Senator Dole's introduction of S. 611); 137 Cong. Rec. H3898 (daily ed. June 4, 1991)(Michel substitute to H.R. 1). The Senate version garnered only eight co-sponsors and was never put up for a vote; the House version was defeated. Thus, Congress again rejected the Administration's proposals for purely prospective application. See 137 Cong. Rec. H3908-09 (daily ed. June 4, 1991).

¹⁷ In his veto message, President Bush referred to Attorney General Thornburgh's memorandum, and stated that it explained more fully the reasons for his veto. 26 Weekly Comp. Pres. Doc. 1632 (Oct. 22, 1990). Attorney General Thornburgh's memorandum objected to the 1990 Act's application to final judgments, not pending cases:

"Several other provisions of this bill have little to do with promoting civil rights. Rather, they seem principally designed to give plaintiffs special and unwarranted litigation advantages. . . . Section 15 unfairly applies the changes in the law made by S. 2104 to cases already decided."

Attorney General Thornburgh's Memorandum for the President (Oct. 22, 1990). (Appendix A, attached hereto, at A-13)

During the debate over the 1991 Act, Senators Kennedy and Danforth drafted a compromise bill. The bill replaced the proposed language on the applicability of the 1990 Act with the first sentence of the Administration's proposal. The second sentence, making the Act explicitly prospective, was deleted. Thus, the drafters of the 1991 Civil Rights Act could not be said to have intended to limit the Act only to future claims, while excluding pending claims. See *Russello v. United States*, 464 U.S. 16, 23-24 (1983). On the contrary, Congress's action in deleting the limiting language supports application of the Act to pending cases.

In sum, the plain language of the 1991 Civil Rights Act mandates its application to pending cases. To give effect to every clause and every section, the Act must generally apply to pending cases, except as otherwise specifically provided. No other reading of the Act makes sense. Moreover, no clear legislative intent contradicts the Act's plain language. Indeed, the statutory evolution of the Act provides further evidence that Congress clearly understood, partisan rhetoric aside, that the Act would apply to pending cases.¹⁸

¹⁸ The controversy surrounding section 402(b), which provides that the Act does not apply to the litigation involving the Wards Cove Packing Company, supports our reading of the plain language of the Act. When the 1991 Civil Rights Act first passed the Senate on October 30, 1991, section 402(b) was inadvertently omitted. The bill was returned to the floor for a separate vote. The return of the bill generated an intense debate over the propriety of exempting one specific company from legal standards that would be applicable to all other persons if the Act applied to pending cases. This action would only be necessary, of course, if the Act otherwise applied to pending cases. Similar opposition to the exemption of the Wards Cove Packing Company occurred when the compromise bill, containing section 402(b), was brought to the floor of the House. Congress and the President ultimately agreed to include section 402(b) in the 1991 Act.

It is hard to imagine that there would have been such a controversy over the "Wards Cove" provision, and such an insistence that section 402(b) be included, had Congress understood that the 1991 Act did not apply to pending cases. Had the Act been so limited, an exemption for the Wards Cove Packing Company would obviously have been unnecessary.

III. APPLICATION OF JUDICIAL PRESUMPTIONS RESULTS IN THE SAME CONCLUSION.

Courts should turn to judicial presumptions to interpret statutes only when the plain language of the statute at issue is inconclusive. See *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990). Here, as we have argued, the plain language of the statute provides that the Act applies to pending cases, and there is no clear congressional intent to the contrary. Thus, the inquiry should begin and end with the language of the Act. However, even if the language were ambiguous—and we submit it is not—rules of judicial presumptions lead to the same result as under the plain language analysis: the Act applies to pending cases.¹⁹

¹⁹ Many of the lower courts that have addressed the issue of the Act's applicability to pending cases have barely acknowledged or have ignored the statutory language, and relied instead on judicial presumptions. See *Butts v. City of New York Dep't of Hous. Preservation and Dev.*, No. 92-7850, 1993 WL 85026, at * 12-15 (2d Cir. Mar. 24, 1993) (relying on judicial presumptions to hold that the act does not apply to pending cases except those that were pending on appeal when the Act was passed); *Baynes v. AT&T Technologies, Inc.*, 976 F.2d 1370, 1373-75 (11th Cir. 1992) (refusing to apply the Act to pending cases because of judicial presumptions); *Gersman v. Group Health Ass'n, Inc.*, 975 F.2d 886, 892-900 (D.C. Cir. 1992) (same), petition for cert. filed, 61 U.S.L.W. 3523 (Jan. 13, 1993) (No. 92-1190); *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363, 1373-74 (5th Cir. 1992) (same), petition for cert. filed, 61 U.S.L.W. 3356 (Sept. 29, 1992) (No. 92-737); *Mozee v. American Commercial Marine Serv. Co.*, 963 F.2d 929, 934-40 (7th Cir.) (same), cert. denied, 113 S. Ct. 207 (1992).

The Sixth Circuit in *Vogel v. City of Cincinnati*, 959 F.2d 594, 598 (6th Cir.), cert. denied, 113 S. Ct. 86 (1992), also refused to apply the Act to pending cases, but the court relied primarily on an EEOC policy statement issued December 27, 1991, that declined to seek damages for pre-Act conduct. See EEOC Notice No. 915,002, reprinted in EEOC Compl. Manual (CCH) at ¶ 2096. Reliance on that policy guidance is misplaced for at least two reasons.

First, the December 27, 1991, policy statement has since been rejected by a majority of the EEOC Commission. 1993 Daily Labor Rep. (BNA) No. 59, at AA-1 (Mar. 30, 1993). Chairman Kemp subsequently challenged the propriety of that rejection on the grounds that the Commission had not followed the proper procedures. The Commission then considered the issue again, this time following the procedure for notice and comment, and affirmed its rejection of the policy

A. The Standard for Applying New Statutes to Pending Cases is Found in *Bradley v. School Board of Richmond*.

The general standard for determining when a new statute should be applied to pending cases is set forth in this Court's unanimous decision in *Bradley v. School Board of Richmond*: "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary". 416 U.S. 696, 711-15 (1974)(citing *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110, 2 L. Ed. 49 (1801); *Thorpe v. Housing Auth.*, 393 U.S. 268, 281-82 (1969)). In explaining the manifest injustice exception, the *Bradley* Court stated that "[t]he concerns expressed by the Court in *Schooner Peggy* and in *Thorpe* relative to the possible working of an injustice center upon (a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights". *Bradley*, 416 U.S. at 717.

statement. 1993 Daily Labor Rep. (BNA) No. 71, at A-1 (Apr. 15, 1993).

Second, while an administrative interpretation of a statute by the agency that administers it should generally be given deference, see *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984), this Court has not hesitated to reject EEOC interpretations in the past. See *EEOC v. Arabian Am. Oil Co.*, 111 S. Ct. 1227, 1235 (1991)(rejecting EEOC's interpretations of Title VII because agency was not charged with administering the statute); *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976)(same). The EEOC policy statement here should not be given deference, because the EEOC has no rulemaking responsibility regarding application of the 1991 Civil Rights Act to pending cases. See *General Elec.*, 429 U.S. at 141. Further the policy statement is not persuasive, because it rests largely on the EEOC's reading of Supreme Court precedents, not on its administrative expertise. See *Carpenter v. Ford Motor Co.*, No. 90-C-5822, 1992 WL 80061, at *4 (N.D. Ill. Apr. 10, 1992); cf. *General Elec.*, 429 U.S. at 141-42 (an agency's rules or regulations promulgated according to statutory authority are accorded the most weight).

The origin and justification for the *Bradley* rule of application are found in the words of Chief Justice Marshall in *Schooner Peggy*:

"It is in the general true that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional . . . I know of no court which can contest its obligation."

5 U.S. (1 Cranch) at 110.

The *Schooner Peggy* Court cautioned that "in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties". *Id.* (emphasis added). From *Schooner Peggy*, the Court developed the rule that a new statute generally applies to cases pending at the time of its passage, but should not be construed retroactively to alter vested rights. The Court "uniformly refuse[d] to give to statutes a retrospective operation, whereby rights previously vested [were] injuriously affected, unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature . . . 'or unless the intention of the legislature [could not] otherwise be satisfied'". *Chew Heong v. United States*, 112 U.S. 536, 559 (1884) (quoting *United States v. Heth*, 7 U.S. (3 Cranch) 399, 413, 2 L. Ed. 479 (1806)).

In *Thorpe v. Housing Authority*, 393 U.S. 268, 272, 283 (1969), this Court held that even though a Department of Housing and Urban Development circular did not indicate whether it was to be applied to pending cases, the circular, which required the local housing authority to inform the tenant of the reasons for eviction and give the tenant an opportunity to reply, was nonetheless to be applied to anyone residing in the housing project at issue on the date it was promulgated. In so holding, this Court relied on the general rule "that an appellate court must

apply the law in effect at the time it renders its decision". *Thorpe*, 393 U.S. at 281 (citations omitted).

This Court has repeatedly affirmed its commitment to the *Bradley* rule that a court should apply the law at the time of its decision. In *Cort v. Ash*, 422 U.S. 66 (1975), for example, this Court relied on the *Bradley* rule to apply an amendment to the Federal Election Campaign Act of 1971 to a pending action. Citing *Bradley*, this Court stated "the Amendments constitute an intervening law that relegates to the Commission's cognizance respondent's complaint . . . [O]ur duty is to decide this case according to the law existing at the time of our decision". *Id.* at 76-77.²⁰

In *Bennett v. New Jersey*, 470 U.S. 632 (1985), this Court, citing *Bradley*, refused to apply an amendment to Title I of the Elementary and Secondary Education Act of 1965 to pending claims. Focusing on the *Bradley* Court's concern with vested rights and expectations of the parties, the *Bennett* Court noted that the Department of Education's "right . . . had matured or become unconditional" because grant programs are "much in the nature of a contract". *Id.* at 638, 639 (quotations omitted). Because the Court found that applying changes in the substantive requirements for federal grants would be manifestly unjust, the Court concluded that "reliance on [the *Bradley*] presumption in this context [*i.e.*, where affecting vested rights works a manifest injustice] is inappropriate". *Id.* at 638.²¹

²⁰ See also *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 87 (1982) (majority opinion) (assuming statutory amendments apply to the earlier arising case); see *id.* at 90-91 n.1 (dissenting opinion) (quoting rule in *Bradley*); *Bell v. New Jersey*, 461 U.S. 773, 793 (1983) (White, J., concurring) (quoting rule in *Bradley*).

²¹ The *Bennett* Court spoke in terms of "substantive" and "procedural"—refusing to apply new substantive law to pre-act conduct but allowing new procedural law to apply to pre-act conduct. Those labels are actually a proxy for a determination of whether the law at issue affects vested rights. As a practical matter, "[r]etroactive modification of remedies normally harbors much less potential for mischief than retroactive changes in the principles of liability". *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 93 (D.C. Cir.), *cert. denied*, 449 U.S. 905 (1980). And, conversely, "a law that affects substantive rights of the parties, if applied retroactively, will usually also upset

Three years after *Bennett*, this Court decided *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988). The question in *Bowen* was "whether the Secretary may exercise this rulemaking authority to promulgate cost limits that are retroactive". *Id.* at 206. The rule in question would have permitted the United States to recoup fees already properly paid to the hospital under prior reimbursement standards. See *id.* at 206-07. Relying on the "statutory scheme in question," the Court held that the rule-making authority of the Secretary of Health and Human Services did not include the "authority to promulgate retroactive cost-limit rules". *Id.* at 215. But, the majority opinion also contained the following dictum: "Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result". *Id.* at 208.²²

It is that dictum that caused this Court, two years later in *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990), to describe the *Bradley* and *Bowen* lines of authority as existing in "apparent tension". The *Bonjorno* Court did not need to reconcile that apparent tension, however—or even decide whether the tension was real—because it found the plain language of the statute at issue controlling. *Id.* at 837-38. Moreover, four

the reasonable expectations of the parties concerning the legal consequences of their past conduct. But not always". *Gersman v. Group Health Ass'n, Inc.*, 975 F.2d 886, 902 (D.C. Cir. 1992) (Wald, J., dissenting), *petition for cert. filed*, 61 U.S.L.W. 3523 (Jan. 13, 1993) (No. 92-1190). Nevertheless, the focus should be on whether applying a law to a pending case upsets vested rights or expectations, not on whether the law can be pigeon-holed as substantive or procedural.

²² Despite this Court's broad language in *Bowen*, that case only dealt with whether an administrative agency has the power, pursuant to federal statute, to promulgate regulations that apply retroactively. The issue of retroactive application of a statute or its application to pending cases was not in the question presented and was neither briefed nor argued by the parties.

members of the Court, dissenting as to the meaning of the language of the statute being construed, insisted that *Bowen* and *Bradley* were entirely consistent.

"The Court discerns an 'apparent tension' between the rule of *Bradley*. . . and the rule of *Bowen* The tension [between *Bradley* and *Bowen*] is more apparent than real, for the rule against retroactivity has little to do with this case. This case does not involve true retroaction, in the sense of the application of a change in law to overturn a judicial adjudication of rights that has already become final. Nor would application of [the new statutory amendment] in this case require the courts to disturb a legal relation to which the parties have committed themselves, or that they have otherwise reached, in reliance on the state of the law prior to the amendment."

494 U.S. at 864-65 (White, J., dissenting) (citations omitted).

That the tension is merely apparent has, unfortunately, not been recognized by many courts. Considerable judicial resources have been expended discussing the tension between the cases, with some courts concluding that the *Bradley* and *Bowen* decisions cannot be reconciled. See, e.g., *Butts*, No. 92-7850, 1993 WL 85026, at *12-15 (2d Cir. Mar. 24, 1993). That conclusion is incorrect. Properly understood, *Bradley* and *Bowen* are in fact consistent. Indeed, the explanation lies in this Court's reasoning in *Bennett*:

"The Court has refused to apply an intervening change to a pending action where it has concluded that to do so would infringe upon or deprive a person of a right that had matured or become unconditional' [quoting and citing *Bradley*]. This limitation comports with another venerable rule of statutory interpretation, i.e., that statutes affecting substantive rights and liabilities are presumed to have only prospective effect."

Bennett, 470 U.S. at 639. Because *Bennett* involved a statute that altered standards of conduct (i.e., the standards regarding how states could use grants for educationally deprived students) on which the parties would have relied, this Court held that the

statute was presumptively inapplicable to pending cases. See *id.* at 638. A holding to the contrary would have been manifestly unjust under *Bradley*.

Likewise, application of the rule at issue in *Bowen* would have been manifestly unjust within the meaning of *Bradley*. The issue in *Bowen* was whether the rulemaking authority of the Secretary of Health and Human Services included the authority to adopt a "retroactive cost-limit rule". This Court ruled that the Secretary did not have that authority. A retroactive cost-limit rule would have meant that hospitals—after relying on specific cost reimbursement procedures in providing their patients treatment—would have had to return over \$2 million in reimbursement payments to the government. As such, *Bowen* presented a classic reliance problem—the hospitals provided medical services based on the reimbursement scheme then in effect.

As illustrated above, *Bradley* and *Bowen* are consistent. The circumstances under which the *Bowen* presumption applies are the circumstances under which the *Bradley* manifest injustice test would preclude application of the statute in question to pending cases. The *Bradley* presumption does not apply in circumstances under which the *Bowen* presumption applies.²³

²³ A number of circuit courts have recognized that *Bradley* and *Bowen* can be reconciled in this manner. In *Campbell v. United States*, 809 F.2d 563 (9th Cir. 1987), the Ninth Circuit relied on *Bennett* to explain how the lines of *Bradley* and *Bowen* precedent could be reconciled:

"On closer inspection, however, there is no conflict . . . [A] statute is not 'retroactive' simply because facts from the pre-enactment period are implicated. . . . [T]he presumption against 'retroactivity' has generally been applied only when application of the new law would affect rights or obligations existing prior to the change in law."

Campbell, 809 F.2d at 571 (citations omitted); see *FDIC v. Wright*, 942 F.2d 1089, 1095 n.6 (7th Cir. 1991) ("Any tension between the two lines of precedent is negated because, under *Bradley*, a statute will not be deemed to apply retroactively if it would threaten manifest injustice by disrupting vested rights."), *cert. denied*, 112 S. Ct. 1937 (1992); *C.E.K. Indus. Mechanical Contractors, Inc. v. NLRB*, 921 F.2d 350, 357-58 n.7 (1st Cir. 1990) ("the touchstone for deciding the question of retroactivity is whether retroactive application of a

We submit that the *Bradley* presumption is consistent not only with *Bowen*, but with almost two hundred years of this Court's jurisprudence: application of a new statute to pending claims is disfavored where it would adversely affect a party's vested rights or reasonable expectations.²⁴ The relevant inquiry is whether

newly announced principle would alter substantive rules of conduct and disappoint private expectations").

²⁴ We respectfully disagree with the view expressed by Justice Scalia in his concurrence in *Kaiser Aluminum & Chem. Co. v. Bonjorno*, 494 U.S. 827, 841 (1990) (Scalia, J., concurring). We submit that the *Bradley* presumption is supported by a long line of judicial authority. See, e.g., *Thorpe v. Housing Auth.*, 393 U.S. 268, 281 (1969) (HUD circular should be applied to pending cases because "an appellate court must apply the law in effect at the time it renders its decision"); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 464 (1921) (the Clayton Act "was effective from the time of its passage, and applicable to pending suits for injunction") (citing *Schooner Peggy*); *United States v. Heinszen & Co.*, 206 U.S. 370, 387 (1907) ("The bringing of suits vests in a party no right to a particular decision . . . and his case must be determined on the law as it stands, not when the suit was brought, but when the judgment is rendered" (citations omitted)); *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110, 2 L. Ed. 49 (1801) ("if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed").

The application of the presumption in *Bradley* has led to clear and predictable results. Indeed, it was not until the dictum in *Bowen* that there was any confusion. *Bowen* was a unanimous decision, as was *Bradley*. There is no citation to *Bradley* in the *Bowen* decision. See also *United States v. Security Indus. Bank*, 459 U.S. 70, 80-82 (1982) (unanimous decision not to apply new statute to pending case because it would destroy pre-existing property rights (no citation to *Bradley*)). In addition, a decision to overturn or modify *Bradley* would have enormous and unpredictable effects on various statutes throughout the United States Code. Congress often does not attempt to specify which provisions would and would not apply to pre-existing cases. Instead, Congress generally leaves that issue to the courts to be determined by the application of established legal principles. To now alter these rules in construction would cause much disruption.

Finally, continued vitality of *Bradley* is necessary because it allows more flexibility than *Bowen*'s per se rule. The flexibility of the *Bradley* rule is beneficial in a wide range of areas. See, e.g., *Demars v. First Serv. Bank for Savings*, 907 F.2d 1237, 1238-40 (1st Cir. 1990) (court cited *Bradley* in applying Financial Institutions Reform, Recovery, and Enforcement Act to pending cases); *United States v. Monsanto Co.*, 858 F.2d 160, 175-76 (4th Cir. 1988) (court

applying the Act to pending cases would affect vested rights, and, if so, whether that application results in manifest injustice. The answer in this case is no on both counts.

B. Section 102 Does Not Implicate Vested Rights.²⁵

Section 102 of the Act provides that a complaining party may recover compensatory and punitive damages for unlawful intentional discrimination.²⁶ Where a complaining party seeks compensatory or punitive damages under section 102, either party may demand a trial by jury.

Applying the damages provision of section 102 to pending cases will not alter vested rights nor will it upset reasonable

relied on *Bradley* for application of amendment to Comprehensive Environmental Response, Compensation, and Liability Act to pending cases), *cert. denied*, 490 U.S. 1106 (1989); *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1553-54 (11th Cir.) (court relied on *Bradley* to apply amendment to Voting Rights Act to pending cases), *cert. denied*, 469 U.S. 976 (1984). Because the Court's statement against retroactivity in *Bowen* has had no perceptible effect on the actions of Congress in drafting legislation, preservation of the *Bradley* presumption is necessary to give courts the flexibility to apply future statutes correctly.

²⁵ We address only section 102 here because it is the only provision specifically at issue in petitioner's case. As we argue above, the plain language of the Act dictates that, except where the Act states otherwise, the Act applies to pending cases.

²⁶ Section 102 provides, *inter alia*,

"(b) COMPENSATORY AND PUNITIVE DAMAGES.—

(1) DETERMINATION OF PUNITIVE DAMAGES.—A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

....
(c) JURY TRIAL.—If a complaining party seeks compensatory or [p]unitive damages under this section—

(1) any party may demand a trial by jury; and

(2) the court shall not inform the jury of the limitations described in subsection (b)(3)."

expectations.²⁷ In *Bradley*, this Court found that applying an amendment to the Education Amendments Act of 1972 providing for attorney's fees for prevailing parties did not impose any "additional or unforeseeable" obligations on the parties whose cases were pending at the time of enactment because (1) the amendment at issue "did not alter the [defendant's] constitutional responsibility" or change "the substantive obligation of the parties"; (2) the defendant had "engaged in a conscious course of conduct with the knowledge that, under different theories, . . . [it] could have been required to pay . . . fees"; and (3) there was "no indication that the obligation" created by the amendment "if known" would have caused the defendant in that case to alter its conduct. *Bradley*, 416 U.S. 696, 721 (1974). Thus, the Court concluded "it cannot be said that the application of the statute to an award of fees for services rendered prior to its effective date, in an action pending on that date, would cause 'manifest injustice'". *Id.*

The same can be said of section 102 of the Act in the context of this case. Respondent has no "vested" or "unconditional" right to a limit on the type of relief it is obligated to pay under Title VII. Section 102 merely expands the type of monetary relief

²⁷ There is no issue as to whether the first prong of *Bradley* is satisfied. The distinction made in *Bradley* is between litigation among "mere private" individuals and matters of "great national concern". *Bradley*, 416 U.S. at 718-19. Two examples of "great national concern" were identified in *Bradley*—the issue in *Bradley* itself—school desegregation, and provisions of Title II of the 1964 Civil Rights Act. See *Bradley*, 416 U.S. at 718-19. With respect to desegregation, this Court stated "plaintiffs may be recognized as having rendered substantial service both to the Board itself, by bringing it into compliance with its constitutional mandate, and to the community at large by securing for it the benefits assumed to flow from a nondiscriminatory educational system". *Id.* at 718. Referring to litigation involving Title II of the 1964 Civil Rights Act, this Court stated that the plaintiff functions "as a 'private attorney general', vindicating a policy that Congress considered of the highest priority". *Id.* at 719 (citations omitted). Title VII is also of vital public importance. Indeed, this Court stated that there was "an equally strong public interest" in the implementation of Title VII and Title II. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415 (1975).

available under Title VII. Further, section 102 brings no new or unanticipated obligations; that is, section 102 does not change the substantive conduct necessary for employers to conform their conduct to the law. The law absolutely prohibits—and has absolutely prohibited at least since Title VII became law in 1964—intentional discrimination. "The law has never countenanced that an employer may weigh the legal consequences of his discrimination and choose to continue his unlawful conduct. An employer cannot pay for the right to discriminate because no such 'right' has ever existed." *Robinson v. Davis Memorial Goodwill Indus.*, 790 F. Supp. 325, 332 (D.D.C. 1992)(Sporkin, J.); cf. *International Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls, Inc.*, 111 S. Ct. 1196, 1209 (1991)("the incremental cost of hiring women cannot justify discriminating against them"). Indeed, to argue that it would upset the settled expectations of the parties to impose compensatory or punitive damages once Title VII liability has been found, or, in the words of the Court of Appeals for the Fifth Circuit, it would impose an "additional or unforeseeable obligation" on respondents, is to adopt a particularly extreme version of the "bad man" theory of the law—that because there was no damages remedy, respondents had a legitimate or settled expectation that they could violate Title VII with impunity and without adverse consequences. Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 461-62 (1897).

The Seventh Circuit has articulated the view that "[t]he amount of care that individuals and firms take to avoid subjecting themselves to liability whether civil or criminal is a function of the severity of the sanction, and when the severity is increased they are entitled to an opportunity to readjust their level of care in light of the new environment created by the change". *Luddington v. Indiana Bell Tel. Co.*, 966 F.2d 225, 229 (7th Cir. 1992), petition for cert. filed, 61 U.S.L.W. 3446 (Dec. 3, 1992)(No. 92-977). This argument proceeds upon two premises: (1) in deciding whether to follow the law, people weigh the potential costs of liability against the benefits to be gained from not following the law; and (2) when a person decides not to

follow the law, that person's expectations about the potential liability he or she risks are "settled expectations" that the law should recognize as valid, and protect.

The first premise may be correct as a descriptive matter—certainly one reason for increasing the costs of non-compliance with a law is precisely to encourage greater compliance with that law. The second premise is incorrect as a normative matter. Only a person's settled expectations about compliance with the law are entitled to recognition; indeed, that is one basis for the manifest injustice exception of *Bradley*. If one's substantive behavior conforms to the law in effect at the time of the behavior, that gives rise to an expectation of non-liability that the law must recognize as valid. The converse is not true. We assert that this Court should not protect as "settled" a person's expectations about the consequences of deliberate non-compliance with the law.²⁸

Likewise, applying the jury trial provision in section 102 to pending cases will not alter vested rights or upset reasonable expectations. Defendants have no vested right to a bench trial. See *Hallowell v. Commons*, 239 U.S. 506, 508 (1916) (the new law "takes away no substantive right, but simply changes the tribunal that is to hear the case", and thus should apply to pending claim); see also *Scarboro v. First Am. Nat'l Bank of Nashville*, 619 F.2d 621, 622 (6th Cir.) (per curiam) ("we do not believe that a jury resolution of plaintiff's claims poses any threat of injustice to either party"), *cert. denied*, 449 U.S. 1014 (1980); cf. *Bell v. New Jersey*, 461 U.S. 773, 794 (1983) (White, J. concurring) ("there is no manifest injustice in a simple change of forum"). Further, respondent can hardly argue that it would have

²⁸ Judge Posner's view has a surface plausibility because it is an arguably correct statement as applied to negligence law: under that legal regime, it is recognized that individuals may properly determine the amount of care to be taken by analyzing the probable costs of failing to take greater care. *United States v. Carroll Towing Co.*, 159 F.2d 169, 172-73 (2d Cir. 1947) (Hand, J.). However, even with respect to negligence, once a statute defines the required standard of care, the individual no longer has the power to trump that legislative determination by his or her private cost/benefit analysis.

altered its discriminatory or harassing conduct had it known that the trier of fact was to be a jury rather than a judge.

Both the damages and jury trial provisions of section 102 change the remedies or procedures to be applied to claims; they do not affect a defendant's vested rights or settled expectations. "'No one has a vested right in any given mode of procedure.'" *Ex Parte Collett*, 337 U.S. 55, 71 (1949) (quoting *Crane v. Hahlo*, 258 U.S. 142, 147 (1922)). Nor does a party have a vested right to a particular remedy for a violation of the law. "Modification of remedy merely adjusts the extent, or method of enforcement, of liability in instances in which the possibility of liability previously was known. For this reason, absent contrary direction from Congress, courts are more inclined to apply retroactively changes in remedies than changes in liability." *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 93 (D.C. Cir.), *cert. denied*, 449 U.S. 905 (1980).

Further, the "manifest injustice" inquiry required by *Bradley*—in cases where the statute is not clear on its face—focuses on the impact on the individual defendant if a statute is applied to a pending case. Thus, courts look to the reasonableness of the defendant's expectations as to whether its conduct is lawful, not the defendant's expectations as to the costs of admittedly unlawful behavior or the procedural mechanisms to address that behavior. The law should protect the victims of illegal discrimination, not preserve employers' calculations of the cost of committing unlawful acts.

In this case, the impact of applying section 102 on the respondent is minimal. Because the issue of intentional discrimination was uncontested on appeal, the only issue open for remand is the quantum of damages. There can be no injustice, manifest or otherwise, in requiring the respondent to pay damages for its intentional discrimination and in submitting that question to a jury for resolution.

IV. PRUDENTIAL CONSIDERATIONS SUPPORT APPLICATION OF THE ACT TO PENDING CASES.

There can be no injustice in providing a remedy here when Congress has already determined that existing remedies are inadequate. The application of section 102 to pending cases is consistent with the traditional presumption that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done". *Franklin v. Gwinnett County Pub. Schs.*, 112 S. Ct. 1028, 1033 (1992)(quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)). This presumption is derived from the early years of the Republic. See *Franklin*, 112 S. Ct. at 1033. "In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L. Ed. 60 (1803), . . . Chief Justice Marshall observed that our government 'has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.'" *Id.* (quoting *Marbury*, 5 U.S. (1 Cranch) at 163). Here, Barbara Landgraf's vested right to be free from sexual harassment has been violated. Section 102 of the Civil Rights Act of 1991 provides a remedy to compensate victims like Barbara Landgraf for the wrongs they suffered in violation of Title VII. To deny that remedy to victims of sexual harassment or discrimination whose cases are pending, is to deny those victims a remedy for a violation of a vested legal right even though Congress has already expressed its intention, through its statutes, that such remedies should be available.

Further, it just cannot be that after responding to eight Supreme Court decisions, some of which were overturned,²⁹

²⁹ Section 101 responds to *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), by defining "make and enforce contracts" to include the terms and conditions of the contract. Sections 104 and 105 respond to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), by setting forth the standard for an unlawful employment practice based on disparate impact. Section 107 responds to *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), by providing remedies for mixed motive discrimination cases. Section 108 responds to *Martin v. Wilks*, 490 U.S. 755 (1989), by limiting challenges to litigated and consent judgments and orders

Congress intended the courts to continue applying them to pending cases. A finding of prospective application would lead to parallel, inconsistent lines of jurisprudence. Courts would be required to develop and expand their interpretations of these cases while, at the same time, developing and applying a new line of jurisprudence interpreting the 1991 Act. Confusion between these two lines of cases would be inevitable and unavoidable. The development of these parallel lines of cases, together with the resolution of confusion in their application, would also cause an enormous waste of judicial resources. Congress could not reasonably be said to have intended such a result.

The dangers of this parallel, inconsistent jurisprudence are not trivial, because civil rights cases take an inordinate amount of time to proceed through the courts. See *Estate of Reynolds v. Martin*, 985 F.2d 470, 475-76 (1993). For example, the discriminatory conduct in the eight cases overruled by the 1991 Act was, on average, nine years old by the time the case reached the Court. See *id.* If the 1991 Act does not apply to pending cases, the new remedies and procedures provided in the Act will not fully take effect in this century. That result cannot be—and we submit it is not—what Congress intended.

resolving employment discrimination claims. Section 109 responds to *EEOC v. Arabian Am. Oil Co.*, 111 S. Ct. 1227 (1991) by providing remedies to Americans in foreign countries who were discriminated against by American firms. Section 112 responds to *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989), by allowing more individuals to challenge discriminatory seniority systems. Section 113 responds to *West Virginia Univ. Hosp. v. Casey*, 111 S. Ct. 1138 (1991), by permitting expert fees as part of attorney's fees. Section 114 responds to *Library of Congress v. Shaw*, 478 U.S. 310 (1986), by providing that individuals in cases that involve Federal agencies may receive the same interest to compensate for delay in payment as individuals in cases that involve nonpublic parties.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Court remand her case to the court of appeals for an order directing the district court to conduct a jury trial on damages.

April 30, 1993.

Respectfully submitted,

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APPENDIX A

**ATTORNEY GENERAL THORNBURGH'S
MEMORANDUM FOR THE PRESIDENT**

OCTOBER 22, 1990

A-1

Office of the Attorney General

Washington, D.C. 20530

October 22, 1990

MEMORANDUM FOR THE PRESIDENT

FROM: DICK THORNBURGH
ATTORNEY GENERAL

SUBJECT: S. 2104, the "Civil Rights Act of 1990"

This memorandum sets forth my views, and those of the Department of Justice, on S. 2104, the "Civil Rights Act of 1990." Although the bill contains some provisions that we both would like to see become law, S. 2104 is fatally flawed.

On May 17, 1990, in a Rose Garden speech marking the reauthorization of the Civil Rights Commission, you outlined the principles that would guide the approach of your Administration to civil rights legislation. You stated that: (1) civil rights legislation must operate to obliterate consideration of factors such as race and sex from employment decisions; (2) it must reflect fundamental principles of fairness that apply throughout our legal system; and (3) it should strengthen deterrents against harassment in the workplace based on race, sex, religion, or disability, but should not produce a new and unjustified lawyers' bonanza.

S. 2104 is not consistent with these principles. It creates powerful incentives for employers to adopt quotas in order to avoid litigation. It shields discriminatory consent decrees from legal challenge under many circumstances. And it contains several provisions that will serve primarily to foster litigation rather than conciliation and mediation.

I. INCENTIVES FOR EMPLOYERS TO ADOPT QUOTAS

Sections 3 and 4 of S. 2104 create strong incentives for employers to adopt quotas. Although putatively needed to "restore" the law that existed before the Supreme Court's opinion in Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989), these sections actually engage in a sweeping rewrite of the law of employment discrimination.

In Griggs v. Duke Power Co., 401 U.S. 424 (1971), the Supreme Court ruled that Title VII of the Civil Rights Act of 1964 prohibits hiring and promotion practices that unintentionally but disproportionately exclude persons of a particular race, sex, ethnicity, or religion unless these practices are justified by business necessity. Law suits challenging such practices are called "disparate impact" cases, in contrast to "disparate treatment" cases brought to challenge intentional discrimination.

In a series of cases decided in subsequent years, the Supreme Court refined and clarified the doctrine of disparate impact. In 1988, the Court greatly expanded the scope of the doctrine's coverage by applying it to subjective hiring and promotion practices (the Court had previously applied it only in cases involving objective criteria like diploma requirements and height-and-weight requirements). Justice O'Connor took this occasion to explain with great care both the reasons for the expansion and the need to be clear about the evidentiary standards that would operate to prevent the expansion of disparate impact doctrine from leading to quotas. In the course of her discussion, she pointed out:

"[T]he inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures. . . . [E]xtending disparate impact analysis to subjective employment practices has the potential to create a Hobson's choice for employers and thus to lead in practice to perverse results. If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such

measures will be widely adopted. The prudent employer will be careful to ensure that its programs are discussed in euphemistic terms, but will be equally careful to ensure that the quotas are met." Watson v. Fort Worth Bank & Trust Co., 108 S. Ct. 2777, 2787-2788 (1988) (plurality opinion).

The following year, in Wards Cove, the Court considered whether the plaintiff or the defendant had the burden of proof on the issue of business necessity. Resolving an ambiguity in the prior law, the Court placed the burden on the plaintiff. Supporters of S. 2104 argue that this rule imposes an unreasonable burden on employees, and have claimed that legislation is needed to redress this imbalance. As you know, your Administration is prepared to accept the shifting of that burden to the defendant.

Sections 3 and 4 of S. 2104, however, go far beyond this shift in the burden of proof. First, the bill effectively creates a new presumption of discrimination whenever a plaintiff shows a sufficient statistical disparity in the racial, sexual, ethnic, or religious makeup of an employer's workforce, even if the plaintiff fails to identify any employment practice that has caused the disparity. Second, it defines "business necessity" in an unduly restrictive way. Finally, it imposes unreasonable restrictions on the type of evidence an employer may use in proving business necessity. In combination, these provisions will force employers to choose between (1) lengthy litigation, under rules rigged heavily against them, or (2) adopting policies that ensure that their numbers come out "right." Put another way, the bill exerts strong pressure on employers to adopt surreptitious quotas.

A. THE PRESUMPTION OF DISCRIMINATION ARISING FROM STATISTICAL DISPARITIES

Under Section 4, a plaintiff may bring a disparate impact case by alleging that a "group of employment practices results in" significant statistical disparity. "Group of employment practices" is very broadly defined in Section 3 to include any "combination

of employment practices that produces one or more decisions with respect to employment . . ."

That definition provides no limitation whatsoever: all practices that combine to produce, say, hiring decisions -- for example, use of a high school graduation requirement, plus an interview, plus job references, plus a requirement of a clean criminal record -- all could be lumped together as a single "group." Thus, if an employer's bottom line numbers are "wrong," the employer can be forced to prove that every practice is required by "business necessity."

Section 4 includes language emphasizing this point. Subsection (k)(1)(B)(i) states that "except as provided in clause (iii), if a complaining party demonstrates that a group of employment practices results in a disparate impact, such party shall not be required to demonstrate which specific practice or practices within the group results in such disparate impact" (emphasis added). The exception in clause (iii) seems at first to state the opposite, but actually takes away what it seems to give. Specificity is not required where the defendant has "failed to keep such records" as are "necessary to make [the] showing" of specifically which "practice or practices are responsible for the disparate impact."

Thus, the bill requires any employer whose workforce has the "wrong" bottom line numbers to point to records showing that one of its practices could have been challenged as "responsible for" the disparate impact. This is not a mere recordkeeping requirement: it is essentially a transfer from the plaintiff to the defendant of the obligation to make out the bulk of the plaintiff's prima facie case. The transfer of obligations is merely disguised as a recordkeeping requirement. An employer who cannot meet the burden created by this rule faces the prospect of defending all of its employment practices under the business necessity test.

This concealed obligation does not merely create all the record-keeping burdens one would imagine, but also a classic Catch-22: if an imbalance in the employer's workforce is caused

by something other than the employer's practices (by housing patterns, for example), so that the employer could not possibly have kept records showing which of its practices was responsible for the imbalance (because none was), a prima facie case will nevertheless be deemed to have been established because the group of practices "results in" a disparate impact and the employer cannot possible explain it from his own records.

The notion of allowing plaintiffs to attack a "group of practices" without showing that each member of the group has caused a disparate impact has absolutely no basis in Supreme Court precedent. All Supreme Court cases prior to Wards Cove focused on the impact of particular hiring practices, and plaintiffs have always targeted those specific practices. See Griggs v. Duke Power Co., 401 U.S. 424 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Dothard v. Rawlinson, 433 U.S. 321 (1977); New York City Transit Authority v. Beazer, 440 U.S. 568 (1979); Connecticut v. Teal, 457 U.S. 440 (1982); Watson v. Fort Worth Bank & Trust Co., 108 S. Ct. 2777 (1988). The new rule created in S. 2104 is inconsistent with a fundamental principle of civil litigation: that the plaintiff is obliged to identify what act of the defendant is responsible for the plaintiff's injury. Even apart from other defects in Sections 3 and 4 of this bill, the treatment of "groups of practices" creates extremely powerful incentives for employers to adopt quotas rather than go through the litigation necessary to establish the "business necessity" of every one of their employment practices.

B. THE BUSINESS NECESSITY DEFINITION AND THE EVIDENTIARY RESTRICTIONS

The risk of surreptitious quotas created by the bill's provisions on "groups of practices" is compounded by S. 2104's unreasonably restrictive definition of "business necessity" and by evidentiary restrictions imposed on employers trying to meet the "business necessity" test. I will discuss each in turn.

1. The Business Necessity Definition

S. 2104 forces employers to defend any employment practice "involving selection" by showing a "significant relationship to successful performance of the job." This standard is new; it is found nowhere in any holding of the Supreme Court. On its face, it is defective because a narrow requirement of this type denies that there can be legitimate and desirable selection or promotion practices aimed at objectives other than successful job performance. Moreover, its very novelty guarantees that it will generate litigation for employers seeking to defend themselves. Finally, the bill's peculiar treatment of prior cases is likely to suggest to courts that ambiguities should be resolved against employers. In combination, these defects again make it likely that employers will adopt quotas rather than risk expensive litigation whose outcome will be highly uncertain.

First, simply taking the definition literally, S. 2104 would preclude employers from using hiring or promotion practices serving many legitimate business objectives. Consider, for example, an employer with a policy under which promotions are given only to employees who receive "outstanding" ratings in their current jobs. The justification for such a policy might be that it provides an incentive for all employees to perform in an outstanding manner, thereby promoting overall efficiency within the firm. Under S. 2104, however, the employer could not rely on that justification. Rather, he or she would have to attempt to prove that outstanding performance in an employee's current job was "significant[ly] relat[ed] to successful performance" of the next job. In many cases, this might be impossible.

There is no sound policy reason for confining in this way the justifications an employer may offer for its selection practices. Nor were such restrictions required by Supreme Court decisions prior to Wards Cove. See, e.g., Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971); New York City Transit Authority v. Beazer, 440 U.S. 568, 587 n.31 (1979); Watson v. Fort Worth Bank & Trust Co., 108 S. Ct. 2777, 2790 (1988) (plurality opinion). Indeed, the Wards Cove dissent itself made clear that

under Griggs any "valid business purpose" would suffice. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2129 (1989) (Stevens, J., dissenting).

The statement in S. 2104 that the definition of business necessity is intended to codify Griggs cannot alter the inconsistency between the bill's text and the language of Griggs, or the inconsistency between the bill's text and almost two decades of Supreme Court precedent interpreting Griggs. Instead, it merely guarantees confusion as courts attempt to sort out precisely what Congress had in mind. This confusion will be time-consuming and very expensive. And it will bring no benefit to the victims of discrimination.

Finally, in attempting to interpret the confusing definition of "business necessity," some courts would likely come to the conclusion that Congress intended to bring about certain highly undesirable results. First, the bill states that it is designed to overrule Wards Cove's "treatment of business necessity as a defense." Part of that treatment of business necessity, though, was the Court's rejection of the view that an employer is required to show that the "challenged practice [is] 'essential' or 'indispensable' to the employer's business." Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2126 (1989). As the Supreme Court noted, "this degree of scrutiny would be almost impossible for most employers to meet, and would result in a host of evils," including quotas. *Id.* Rather, the Court quite reasonably found that "the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer." *Id.* at 2125-2126 (citing Watson and Baezer as well as Griggs). On this issue, as pointed out above, the dissent in Wards Cove is in agreement.

In light of these statements, a statutory provision overruling "the treatment of business necessity" in Wards Cove could reasonably be interpreted by many courts as returning the bill's definition of business necessity to the widely criticized standard included in the original incarnation of S. 2104 ("essential to effective job performance"). This inference would be strengthened

by two other provisions of the bill: Section 2 ("Findings and Purposes") and Section 11 ("Construction"). Working in tandem, Sections 2 and 11 would likely lead some courts to resolve ambiguities in the bill against prior decisions by the Supreme Court and against defendants.

2. Evidentiary Restrictions

Finally, employers who must attempt to meet the business necessity test must do so by means of "demonstrable evidence." This is a new term invented by the bill, and no definition is provided. The bill contains a long list of types of evidence that courts may "receive," but bill does not say that any of these necessarily constitutes "demonstrable evidence." Courts will likely understand the use of this new term (particularly in light of Sections 2 and 11 of the bill) to mean that Congress is referring to some category of evidence that is narrower than the category of evidence on which courts would otherwise rely. The effect of this provision, then, will apparently be to indirectly raise the burden of proof on the defendant beyond what it would otherwise be.

I am not aware that any justification has been offered for restricting the kind of evidence on which courts may rely in this context. Nor do I believe that it is advisable to force the courts to engage in guessing games about the meaning of a novel term like "demonstrable evidence." As with several other aspects of Sections 3 and 4 of S. 2104, this provision will cause uncertainty among attorneys who must advise employers about the meaning of the law, and it will cause confusion in the courts. No good purpose will be served, and a great deal of pointless expense will be imposed on those who must live under this new legislation.

C. CONCLUSION

So far as I am aware, there is no reported judicial decision indicating any need for a legislative modification of the manner in which the courts handle "group[s] of employment practices" under disparate impact theory. The rule created in S. 2104,

moreover, is contrary to fundamental principles of civil litigation, and it is likely to lead in practice to unjust results.

There is no sound policy reason for the imposition of artificial restrictions of the kind created by S. 2104 on the justifications that employers may offer for legitimate employment practices. Similarly, there is no sound policy reason for imposing on defendants evidentiary restrictions that exist nowhere else in the law and that are not even clearly spelled out in the proposed statute.

The effect of these proposed changes in the law is clear: these provisions, if they are enacted, would exert strong pressure on employers to avoid having to defend their employment practices; the only practicable way for employers to do this would be to avoid the statistical disparities that would require them to mount such a defense. In short, many employers will see no real alternative to adopting quotas.

II. FUNDAMENTAL FAIRNESS AND THE INSULATION OF QUOTAS FROM LEGAL CHALLENGE

The bill in its current form also promotes quotas through its treatment of discriminatory consent decrees. It does this by totally denying certain individuals access to the courts to challenge illegal agreements -- in which these individuals had no part -- prescribing quotas that exclude them from employment opportunities.

Section 6 of S. 2104 would overrule the Supreme Court's decision in Martin v. Wilks, 109 S. Ct. 2180 (1989). That case arose in the context of a civil rights action, but it turned on principles of fairness and access to court that apply in every situation. The Court held that white firefighters who had not been parties to a consent decree that mandated racial preferences could have their day in court to contend that the decree violated their civil rights.

Section 6 would in many circumstances cut off this right and deny some persons, who were never notified of these decrees and had no chance to challenge them, their right to sue. For example, a plaintiff denied a promotion as a result of a discriminatory consent decree in place ten years before the plaintiff was hired would in some circumstances be precluded by Section 6 from challenging the decree.

At the outset, it must be stressed that only certain settlements or consent decrees can be successfully challenged after Martin v. Wilks: those containing provisions that violate an innocent third party's rights under Title VII or the Fourteenth Amendment. The only justification offered for this provision is the systemic interest in the finality of judicial resolution of disputes. But while that interest is important, it should not be pursued at the cost of the requirement of fundamental fairness that underlies our judicial system, in which individuals are traditionally guaranteed a meaningful opportunity to assert their interests in court before they are bound by judicial action.

Moreover, the concern at which Section 6 is assertedly directed, viz. the fear of repeated challenges to the same decree, is largely chimerical. Existing legal doctrines are already adequate to head off nonmeritorious challenges to decrees. The doctrines of law of the case, res judicata, and stare decisis will allow courts to deal with them summarily at little expense in time or money to the parties. In addition, the rules of joinder make it relatively easy for parties to ensure that affected people have their day in court in the original action. The threat of an award of attorney fees against the losing party who brings a frivolous suit is a further deterrent to such challenges.

The bill's treatment of discriminatory seniority systems is in stark contrast with its treatment of discriminatory consent decrees. In dealing with seniority systems, Section 7(b) of the bill appropriately corrects a defect in current law by allowing a plaintiff to challenge a discriminatory seniority system or practice at the time it is applied to the plaintiff. Current law requires the challenge to be made at the time of the adoption of the seniority

system. Consistent with the view taken by your Administration, proponents of S. 2104 have rightly argued that this is unreasonable and should be corrected by legislation.

So far as I am aware, S. 2104's sponsors have given no explanation for this inconsistency between Sections 6 and 7(b) of their bill. The effect of it, however, is quite clear: unlike seniority systems, consent decrees have frequently contained provisions establishing hiring and promotion quotas or racial preferences. Section 6 prevents legal challenges to such provisions. Thus, far from enhancing civil rights, Section 6 severely abridges them.

Section 9 contains a provision complementing the provisions in Section 6. For the first time, Title VII would say that certain civil rights plaintiffs -- those challenging the legality of quotas adopted under a consent decree -- could be required to pay attorneys fees where their lawsuit was neither frivolous nor otherwise unreasonable. The clear effect would be to discourage many challenges to illegal discrimination. The creation of fundamentally unfair obstacles to the vindication of our citizens' civil rights has no place in a civil rights bill.

Proponents of S. 2104 argue that Section 13 of the bill, which states that nothing in the bill "shall be construed to require or encourage an employer to adopt hiring or promotion quotas," is a sufficient answer to the concerns raised here and in Part I of this memorandum. In fact, however, Section 13 is entirely unresponsive to them. The problem with Sections 3 and 4 is not that they directly require or encourage quotas, but rather that employers will in fact choose to adopt quotas in order to avoid having to defend their hiring practices under the unreasonable litigation rules established by the bill. And the problem with Section 6 is not that it requires quotas, but that it insulates them from challenge. In fact, in its present form, Section 13 has an exception from the anti-quota language (and from all other provisions in the bill) for quotas that might be contained in some court-ordered remedies, affirmative action plans, or conciliation agreements.

III. EXPANSION OF REMEDIES UNDER TITLE VII AND PROVISIONS AFFECTING THE INCENTIVES FOR LITIGATION

Section 8 of S. 2104 radically alters the Civil Rights Act of 1964 by making available unlimited compensatory damages, as well as punitive damages and jury trials, in most cases under Title VII.

As you noted in your May 17 speech, federal law should provide an adequate deterrent against harassment in the workplace, and additional remedies are needed to accomplish this goal. Although S. 2104 imposes a partial cap on punitive damages, thereby setting an important precedent in the area of federal tort remedies, the expansion of remedies contained in Section 8 is excessive. Section 8 is not confined to filling the gap where existing remedies are inadequate, such as in many cases of sexual harassment. Rather, it imports into our employment discrimination laws the entire panoply of tort remedies, punitive damages, and jury trials, which runs counter to the concepts of mediation and conciliation upon which Title VII is based. This will create unnecessary and counterproductive litigation, serving the interests of lawyers far more than the interests of aggrieved employees.

Other provisions in S. 2104 will also contribute unnecessarily to fostering litigation instead of conciliation. An amendment to 42 U.S.C. 2000e-5(k), for example, permits plaintiffs to recover attorneys fees for continuing to litigate even if the judgment they ultimately obtain is less favorable than a settlement offer they rejected. Similarly, a new paragraph (2) in 42 U.S.C. 2000e-5k creates special rules impeding waiver of attorney's fees as part of settlement, which will inevitably discourage settlements because defendants will not be able to estimate accurately the total cost of the settlement to which they are being asked to agree.

Several other provisions of this bill have little to do with promoting civil rights. Rather, they seem principally designed to give plaintiffs special and unwarranted litigation advantages.

Section 7(a) gives plaintiffs 2 years, rather than 180 days (or, in certain cases, 300 days), to file discrimination claims. Section 11 creates a special legislative rule of construction for civil rights cases that seems intended to encourage courts to resolve cases in favor of plaintiffs whenever possible. And Section 15 unfairly applies the changes in the law made by S. 2104 to cases already decided.

IV. CONCLUSION

S. 2104, in the form in which it has been presented to you, is seriously flawed. While it contains certain desirable provisions, these sections are greatly outweighed by the portions of the bill that are objectionable in the particulars specified above. Taken as a whole, S. 2104 would do far more to disrupt our legal system and to disappoint the legitimate expectations of our citizens for equal opportunity than it would to advance the goal, to which you and I are both committed, of strengthening the laws against employment discrimination.

APPENDIX B

THE CIVIL RIGHTS ACT OF 1991

**Public Law 102-166
102d Congress**

An Act

To amend the Civil Rights Act of 1964 to strengthen and improve Federal civil rights laws, to provide for damages in cases of intentional employment discrimination, to clarify provisions regarding disparate impact actions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Section 1. SHORT TITLE.

This Act may be cited as the "Civil Rights Act of 1991".

SEC. 2. FINDINGS.

The Congress finds that—

(1) additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace;

(2) the decision of the Supreme Court in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) has weakened the scope and effectiveness of Federal civil rights protections; and

(3) legislation is necessary to provide additional protections against unlawful discrimination in employment.

SEC. 3. PURPOSES.

The purposes of this Act are—

(1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace;

(2) to codify the concepts of "business necessity" and "job related" enunciated by the Supreme Court in *Griggs v.*

Duke Power Co., 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989);

(3) to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); and

(4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.

TITLE I—FEDERAL CIVIL RIGHTS REMEDIES

SEC. 101. PROHIBITION AGAINST ALL RACIAL DISCRIMINATION IN THE MAKING AND ENFORCEMENT OF CONTRACTS.

Section 1977 of the Revised Statutes (42 U.S.C. 1981) is amended—

(1) by inserting “(a)” before “All persons within”; and

(2) by adding at the end the following new subsections:

“(b) For purposes of this section, the term ‘make and enforce contracts’ includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

“(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.”.

SEC. 102. DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION.

The Revised Statutes are amended by inserting after section 1977 (42 U.S.C. 1981) the following new section:

“SEC. 1977A. DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION IN EMPLOYMENT.

“(a) RIGHT OF RECOVERY.—

“(1) CIVIL RIGHTS.—In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3), and provided that the complaining party cannot recover under section 1977 of the Revised Statutes (42 U.S.C. 1981), the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

“(2) DISABILITY.—In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 505(a)(1) of the Rehabilitation Act of 1973 (29 U.S.C. 794a(a)(1)), respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791) and the regulations implementing section 501, or who violated the requirements of section 501 of the Act or the regulations implementing section 501 concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

“(3) REASONABLE ACCOMMODATION AND GOOD FAITH EFFORT.—In cases where a discriminatory practice

involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 or regulations implementing section 501 of the Rehabilitation Act of 1973, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

"(b) COMPENSATORY AND PUNITIVE DAMAGES.—

"(1) DETERMINATION OF PUNITIVE DAMAGES.—A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

"(2) EXCLUSIONS FROM COMPENSATORY DAMAGES.—Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964.

"(3) LIMITATIONS.—The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party—

"(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$50,000;

"(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more

calendar weeks in the current or preceding calendar year, \$100,000; and

"(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$200,000; and

"(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$300,000.

"(4) CONSTRUCTION.—Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1977 of the Revised Statutes (42 U.S.C. 1981).

"(c) JURY TRIAL.—If a complaining party seeks compensatory or unitive [sic] damages under this section—

"(1) any party may demand a trial by jury; and

"(2) the court shall not inform the jury of the limitations described in subsection (b)(3).

"(d) DEFINITIONS.—As used in this section:

"(1) COMPLAINING PARTY.—The term 'complaining party' means—

"(A) in the case of a person seeking to bring an action under subsection (a)(1), the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); or

"(B) in the case of a person seeking to bring an action under subsection (a)(2), the Equal Employment Opportunity Commission, the Attorney General, a person who may bring an action or proceeding under section 505(a)(1) of the Rehabilitation Act of 1973 (29 U.S.C. 794a(a)(1)), or a person who may bring an action or proceeding under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.).

"(2) DISCRIMINATORY PRACTICE.—The term 'discriminatory practice' means the discrimination described in paragraph (1), or the discrimination or the violation described in paragraph (2), of subsection (a).

SEC. 103. ATTORNEY'S FEES.

The last sentence of section 722 of the Revised Statutes (42 U.S.C. 1988) is amended by inserting ", 1977A" after "1977".

SEC. 104. DEFINITIONS.

Section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e) is amended by adding at the end the following new subsections:

"(l) The term 'complaining party' means the Commission, the Attorney General, or a person who may bring an action or proceeding under this title.

"(m) The term 'demonstrates' means meets the burdens of production and persuasion.

"(n) The term 'respondent' means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to Section 717."

SEC. 105. BURDEN OF PROOF IN DISPARATE IMPACT CASES.

(a) Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) is amended by adding at the end the following new subsection:

"(k)(1)(A) An unlawful employment practice based on disparate impact is established under this title only if—

"(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

"(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

"(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

"(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

"(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of 'alternative employment practice'.

"(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this title.

"(3) Notwithstanding any other provision of this title, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act or any other provision of Federal law, shall be considered an unlawful employment practice under this title only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin."

(b) No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S 15276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that relates to Wards Cove—Business necessity/cumulation/alternative business practice.

SEC. 106. PROHIBITION AGAINST DISCRIMINATORY USE OF TEST SCORES.

Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) (as amended by Section 105) is further amended by adding at the end the following new subsection:

“(l) It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.”.

SEC. 107. CLARIFYING PROHIBITION AGAINST IMPERMISSIBLE CONSIDERATION OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN IN EMPLOYMENT PRACTICES.

(a) **IN GENERAL**—Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) (as amended by Sections 105 and 106) is further amended by adding at the end the following new subsection:

“(m) Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”.

(b) **ENFORCEMENT PROVISIONS**.—Section 706(g) of such Act (42 U.S.C. 2000e-5(g)) is amended—

(1) by designating the first through third sentences as paragraph (1);

(2) by designating the fourth sentence as paragraph (2)(A) and indenting accordingly; and

(3) by adding at the end the following new subparagraph:

“(B) On a claim in which an individual proves a violation under section 703(m) and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

“(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney’s fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 703(m); and

“(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).”.

SEC. 108. FACILITATING PROMPT AND ORDERLY RESOLUTION OF CHALLENGES TO EMPLOYMENT PRACTICES IMPLEMENTING LITIGATED OR CONSENT JUDGMENTS OR ORDERS.

Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) (as amended by sections 105, 106, and 107 of this title) is further amended by adding at the end the following new subsection:

“(n)(1)(A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

“(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws—

“(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had—

“(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

“(II) a reasonable opportunity to present objections to such judgment or order; or

"(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

"(2) Nothing in this subsection shall be construed to—

"(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

"(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;

"(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

"(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

"(3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of title 28, United States Code."

SEC. 109. PROTECTION OF EXTRATERRITORIAL EMPLOYMENT.

(a) **DEFINITION OF EMPLOYEE.**—Section 701(f) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(f)) and section 101(4) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111(4)) are each amended by adding at the end the following: "With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States."

(b) **EXEMPTION.**—

(1) **CIVIL RIGHTS ACT OF 1964.**—Section 702 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-1) is amended—

(A) by inserting "(a)" after Sec. 702."; and

(B) by adding at the end the following:

"(b) It shall not be unlawful under section 703 or 704 for an employer (or a corporation controlled by an employer), labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining (including on-the-job training programs) to take any action otherwise prohibited by such section, with respect to an employee in a workplace in a foreign country if compliance with such section would cause such employer (or such corporation), such organization, such agency, or such committee to violate the law of the foreign country in which such workplace is located.

"(c)(1) If an employer controls a corporation whose place of incorporation is a foreign country, any practice prohibited by section 703 or 704 engaged in by such corporation shall be presumed to be engaged in by such employer.

"(2) Sections 703 and 704 shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

"(3) For purposes of this subsection, the determination of whether an employer controls a corporation shall be based on—

"(A) the interrelation of operations;

"(B) the common management;

"(C) the centralized control of labor relations; and

"(D) the common ownership or financial control, of the employer and the corporation."

(2) **AMERICANS WITH DISABILITIES ACT OF 1990.**—Section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112) is amended—

(A) by redesignating subsection (c) as subsection (d); and

(B) by inserting after subsection (b) the following new subsection:

"(c) **COVERED ENTITIES IN FOREIGN COUNTRIES.**—

"(1) **IN GENERAL.**—It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee

in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

"(2) CONTROL OF CORPORATION.—

"(A) PRESUMPTION.—If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

"(B) EXCEPTION.—This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

"(C) DETERMINATION.—For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on—

- "(i)** the interrelation of operations;
- "(ii)** the common management;
- "(iii)** the centralized control of labor relations;
- and
- "(iv)** the common ownership of financial control, of the employer and the corporation."

(c) APPLICATION OF AMENDMENTS.—The amendments made by this section shall not apply with respect to conduct occurring before the date of the enactment of this Act.

SEC. 110. TECHNICAL ASSISTANCE TRAINING INSTITUTE.

(a) TECHNICAL ASSISTANCE.—Section 705 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4) is amended by adding at the end the following new subsection:

"(j)(1) The Commission shall establish a Technical Assistance Training Institute, through which the Commission shall provide technical assistance and training regarding the laws and regulations enforced by the Commission.

"(2) An employer or other entity covered under this title shall not be excused from compliance with the requirements of this title because of any failure to receive technical assistance under this subsection.

"(3) There are authorized to be appropriated to carry out this subsection such sums as may be necessary for fiscal year 1992."

(b) EFFECTIVE DATE.—The amendment made by this section shall take effect on the date of the enactment of this Act.

SEC. 111. EDUCATION AND OUTREACH.

Section 705(h) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4(h)) is amended—

(1) by inserting "(1)" after "(h)"; and

(2) by adding at the end the following new paragraph:

"(2) In exercising its powers under this title, the Commission shall carry out educational and outreach activities (including dissemination of information in languages other than English) targeted to—

"(A) individuals who historically have been victims of employment discrimination and have not been equitably served by the Commission; and

"(B) individuals on whose behalf the Commission has authority to enforce any other law prohibiting employment discrimination, concerning rights and obligations under this title or such law, as the case may be."

SEC. 112. EXPANSION OF RIGHT TO CHALLENGE DISCRIMINATORY SENIORITY SYSTEMS.

Section 706(e) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(e)) is amended—

(1) by inserting "(1)" before "A charge under this section"; and

(2) by adding at the end the following new paragraph:

"(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this title (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by

the application of the seniority system or provision of the system.”.

SEC. 113. AUTHORIZING AWARD OF EXPERT FEES.

(a) **REVISED STATUTES.**—Section 722 of the Revised Statutes is amended—

(1) by designating the first and second sentences as subsections (a) and (b), respectively, and indenting accordingly; and

(2) by adding at the end the following new subsection:

“(c) In awarding an attorney’s fee under subsection (b) in any action or proceeding to enforce a provision of section 1977 or 1977A of the Revised Statutes, the court, in its discretion, may include expert fees as part of the attorney’s fee.”.

(b) **CIVIL RIGHTS ACT OF 1964.**—Section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)) is amended by inserting “(including expert fees)” after “attorney’s fee”.

SEC. 114. PROVIDING FOR INTEREST AND EXTENDING THE STATUTE OF LIMITATIONS IN ACTIONS AGAINST THE FEDERAL GOVERNMENT.

Section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16) is amended—

(1) in subsection (c), by striking “thirty days” and inserting “90 days”; and

(2) in subsection (d), by inserting before the period”, and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.”.

—SEC. 115. NOTICE OF LIMITATIONS PERIOD UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967.

Section 7(e) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 626(e)) is amended—

(1) by striking paragraph (2);

(2) by striking the paragraph designation in paragraph (1);

(3) by striking “Section 6 and” and inserting “Section”; and

(4) by adding at the end the following:

“If a charge filed with the Commission under this Act is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 11(a) against the respondent named in the charge within 90 days after the date of the receipt of such notice.”.

SEC. 116. LAWFUL COURT-ORDERED REMEDIES, AFFIRMATIVE ACTION, AND CONCILIATION AGREEMENTS NOT AFFECTED.

Nothing in the amendments made by this title shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law.

SEC. 117. COVERAGE OF HOUSE OF REPRESENTATIVES AND THE AGENCIES OF THE LEGISLATIVE BRANCH.

(a) **COVERAGE OF THE HOUSE OF REPRESENTATIVES.**—

(1) **IN GENERAL.**—Notwithstanding any provision of title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) or of other law, the purposes of such title shall, subject to paragraph (2), apply in their entirety to the House of Representatives.

(2) **EMPLOYMENT IN THE HOUSE.**—

(A) **APPLICATION.**—The rights and protections under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) shall, subject to subparagraph (B), apply with respect to any employee in an employment position in the House of Representatives and any employing authority of the House of Representatives.

(B) **ADMINISTRATION.**—

(i) **IN GENERAL.**—In the administration of this paragraph, the remedies and procedures made applicable pursuant to the resolution described in clause (ii) shall apply exclusively.

(ii) **RESOLUTION.**—The resolution referred to in clause (i) is the Fair Employment Practices Resolution (House Resolution 558 of the One Hundredth Congress, as agreed to October 4, 1988), as incorporated into the Rules of the House of Representatives of the One Hundred Second Congress as Rule LI, or any other provision that continues in effect the provisions of such resolution.

(C) **EXERCISE OF RULEMAKING POWER.**—The provisions of subparagraph (B) are enacted by the House of Representatives as an exercise of the rulemaking power of the House of Representatives, with full recognition of the right of the House to change its rules, in the same manner, and to the same extent as in the case of any other rule of the House.

(b) INSTRUMENTALITIES OF CONGRESS.—

(1) **IN GENERAL.**—The rights and protections under this title and title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) shall, subject to paragraph (2), apply with respect to the conduct of each instrumentality of the Congress.

(2) **ESTABLISHMENT OF REMEDIES AND PROCEDURES BY INSTRUMENTALITIES.**—The chief official of each instrumentality of the Congress shall establish remedies and procedures to be utilized with respect to the rights and protections provided pursuant to paragraph (1). Such remedies and procedures shall apply exclusively, except for the employees who are defined as Senate employees, in section 301(c)(1).

(3) **REPORT TO CONGRESS.**—The chief official of each instrumentality of the Congress shall, after establishing remedies and procedures for purposes of paragraph (2), submit to the Congress a report describing the remedies and procedures.

(4) **DEFINITION OF INSTRUMENTALITIES.**—For purposes of this section, instrumentalities of the Congress include the following: the Architect of the Capitol, the Congressional Budget Office, the General Accounting Office, the Government Printing Office, the Office of Technology Assessment, and the United States Botanic Garden.

(5) **CONSTRUCTION.**—Nothing in this section shall alter the enforcement procedures for individuals protected under section 717 of title VII for the Civil Rights Act of 1964 (42 U.S.C. 2000e-16).

SEC. 118. ALTERNATIVE MEANS OF DISPUTE RESOLUTION.

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.

TITLE II—GLASS CEILING

SEC. 201. SHORT TITLE.

This title may be cited as the “Glass Ceiling Act of 1991”.

SEC. 202. FINDINGS AND PURPOSE.

(a) **FINDINGS.**—Congress finds that—

(1) despite a dramatically growing presence in the workplace, women and minorities remain underrepresented in management and decisionmaking positions in business;

(2) artificial barriers exist to the advancement of women and minorities in the workplace;

(3) United States corporations are increasingly relying on women and minorities to meet employment requirements and

are increasingly aware of the advantages derived from a diverse work force;

(4) the "Glass Ceiling Initiative" undertaken by the Department of Labor, including the release of the report entitled "Report on the Glass Ceiling Initiative", has been instrumental in raising public awareness of—

(A) the underrepresentation of women and minorities at the management and decisionmaking levels in the United States work force;

(B) the underrepresentation of women and minorities in line functions in the United States work force;

(C) the lack of access for qualified women and minorities to credential-building developmental opportunities; and

(D) the desirability of eliminating artificial barriers to the advancement of women and minorities to such levels;

(5) the establishment of a commission to examine issues raised by the Glass Ceiling Initiative would help—

(A) focus greater attention on the importance of eliminating artificial barriers to the advancement of women and minorities to management and decisionmaking positions in business; and

(B) promote work force diversity;

(6) a comprehensive study that includes analysis of the manner in which management and decisionmaking positions are filled, the developmental and skill-enhancing practices used to foster the necessary qualifications for advancement, and the compensation programs and reward structures utilized in the corporate sector would assist in the establishment of practices and policies promoting opportunities for, and eliminating artificial barriers to, the advancement of women and minorities to management and decisionmaking positions; and

(7) a national award recognizing employers whose practices and policies promote opportunities for, and eliminate artificial barriers to, the advancement of women and minorities will foster the advancement of women and minorities into higher level positions by—

(A) helping to encourage United States companies to modify practices and policies to promote opportunities for, and eliminate artificial barriers to, the upward mobility of women and minorities; and

(B) providing specific guidance for other United States employers that wish to learn how to revise practices and policies to improve the access and employment opportunities of women and minorities.

(b) **PURPOSE.**—The purpose of this title is to establish—

(1) a Glass Ceiling Commission to study—

(A) the manner in which business fills management and decisionmaking positions;

(B) the developmental and skill-enhancing practices used to foster the necessary qualifications for advancement into such positions; and

(C) the compensation programs and reward structures currently utilized in the workplace; and

(2) an annual award for excellence in promoting a more diverse skilled work force at the management and decisionmaking levels in business.

SEC. 203. ESTABLISHMENT OF GLASS CEILING COMMISSION.

(a) **IN GENERAL.**—There is established a Glass Ceiling Commission (referred to in this title as the "Commission"), to conduct a study and prepare recommendations concerning—

(1) eliminating artificial barriers to the advancement of women and minorities; and

(2) increasing the opportunities and developmental experiences of women and minorities to foster advancement of women and minorities to management and decisionmaking positions in business.

(b) **MEMBERSHIP.**—

(1) **COMPOSITION.**—The Commission shall be composed of 21 members, including—

(A) six individuals appointed by the President;

(B) six individuals appointed jointly by the Speaker of the House of Representatives and the Majority Leader of the Senate;

(C) one individual appointed by the Majority Leader of the House of Representatives;

(D) one individual appointed by the Minority Leader of the House of Representatives;

(E) one individual appointed by the Majority Leader of the Senate;

(F) one individual appointed by the Minority Leader of the Senate;

(G) two Members of the House of Representatives appointed jointly by the Majority Leader and the Minority Leader of the House of Representatives;

(H) two Members of the Senate appointed jointly by the Majority Leader and the Minority Leader of the Senate; and

(I) the Secretary of Labor.

(2) **CONSIDERATIONS.**—In making appointments under subparagraphs (A) and (B) of paragraph (1), the appointing authority shall consider the background of the individuals, including whether the individuals—

(A) are members of organizations representing women and minorities, and other related interest groups;

(B) hold management or decisionmaking positions in corporation or other business entities recognized as leaders on issues relating to equal employment opportunity; and

(C) possess academic expertise or other recognized ability regarding employment issues.

(3) **BALANCE.**—In making the appointments under subparagraphs (A) and (B) of paragraph (1), each appointing authority shall seek to include an appropriate balance of appointees from among the groups of appointees described in subparagraphs (A), (B), and (C) of paragraph (2).

(c) **CHAIRPERSON.**—The Secretary of Labor shall serve as the Chairperson of the Commission.

(d) **TERM OF OFFICE.**—Members shall be appointed for the life of the Commission.

(e) **VACANCIES.**—Any vacancy occurring in the membership of the Commission shall be filled in the same manner as the original appointment for the position being vacated. The vacancy shall not affect the power of the remaining members to execute the duties of the Commission.

(f) **MEETINGS.**—

(1) **MEETINGS PRIOR TO COMPLETION OF REPORT.**—The Commission shall meet not fewer than five times in connection with and pending the completion of the report described in section 204(b). The Commission shall hold additional meetings if the Chairperson or a majority of the members of the Commission request the additional meetings in writing.

(2) **MEETINGS AFTER COMPLETION OF REPORT.**—The Commission shall meet once each year after the completion of the report described in section 204(b). The Commission shall hold additional meetings if the Chairperson or a majority of the members of the Commission request the additional meetings in writing.

(g) **QUORUM.**—A majority of the Commission shall constitute a quorum for the transaction of business.

(h) **COMPENSATION AND EXPENSES.**—

(1) **COMPENSATION.**—Each member of the Commission who is not an employee of the Federal Government shall receive compensation at the daily equivalent of the rate specified for level V of the Executive Schedule under section 5316 of title 5, United States Code, for each day the member is engaged in the performance of duties for the Commission, including attendance at meetings and conferences of the Commission, and travel to conduct the duties of the Commission.

(2) **TRAVEL EXPENSES.**—Each member of the Commission shall receive travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of title 5, United States Code, for each day the member is engaged in the performance of duties away from the home or regular place of business of the member.

(3) **EMPLOYMENT STATUS.**—A member of the Commission, who is not otherwise an employee of the Federal Government, shall not be deemed to be an employee of the Federal Government except for the purposes of—

(A) the tort claims provisions of chapter 171 of title 28, United States Code; and

(B) subchapter I of chapter 81 of title 5, United States Code, relating to compensation for work injuries.

SEC. 204. RESEARCH ON ADVANCEMENT OF WOMEN AND MINORITIES TO MANAGEMENT AND DECISIONMAKING POSITIONS IN BUSINESS.

(a) **ADVANCEMENT STUDY.**—The Commission shall conduct a study of opportunities for, and artificial barriers to, the advancement of women and minorities to management and decisionmaking positions in business. In conducting the study, the Commission shall—

(1) examine the preparedness of women and minorities to advance to management and decisionmaking positions in business;

(2) examine the opportunities for women and minorities to advance to management and decisionmaking positions in business;

(3) conduct basic research into the practices, policies, and manner in which management and decisionmaking positions in business are filled;

(4) conduct comparative research of businesses and industries in which women and minorities are promoted to management and decisionmaking positions, and businesses and industries in which women and minorities are not promoted to management and decisionmaking positions;

(5) compile a synthesis of available research on programs and practices that have successfully led to the advancement of women and minorities to management and decisionmaking positions in business, including training programs, rotational assignments, developmental programs, reward programs, employee benefit structures, and family leave policies; and

(6) examine any other issues and information relating to the advancement of women and minorities to management and decisionmaking positions in business.

(b) **REPORT.**—Not later than 15 months after the date of the enactment of this Act, the Commission shall prepare and submit to the President and the appropriate committees of Congress a written report containing—

(1) the findings and conclusions of the Commission resulting from the study conducted under subsection (a); and

(2) recommendations based on the findings and conclusions described in paragraph (1) relating to the promotion of opportunities for, and elimination of artificial barriers to, the advancement of women and minorities to management and decisionmaking positions in business, including recommendations for—

(A) policies and practices to fill vacancies at the management and decisionmaking levels;

(B) developmental practices and procedures to ensure that women and minorities have access to opportunities to gain the exposure, skills, and expertise necessary to assume management and decisionmaking positions;

(C) compensation programs and reward structures utilized to reward and retain key employees; and

(D) the use of enforcement (including such enforcement techniques as litigation, complaint investigations, compliance reviews, conciliation, administrative regulations, policy guidance, technical assistance, training, and public education) of Federal equal employment opportunity laws by Federal agencies as a means of eliminating artificial barriers to the advancement of women and minorities in employment.

(c) **ADDITIONAL STUDY.**—The Commission may conduct such additional study of the advancement of women and minorities to management and decisionmaking positions in business as a majority of the members of the Commission determines to be necessary.

SEC. 205. ESTABLISHMENT OF THE NATIONAL AWARD FOR DIVERSITY AND EXCELLENCE IN AMERICAN EXECUTIVE MANAGEMENT.

(a) **IN GENERAL.**—There is established the National Award for Diversity and Excellence in American Executive Management, which shall be evidenced by a medal bearing the inscription “Frances Perkins-Elizabeth Hanford Dole National Award for Diversity and Excellence in American Executive Management”. The medal shall be of such design and materials, and bear such additional inscriptions, as the Commission may prescribe.

(b) **CRITERIA FOR QUALIFICATION.**—To qualify to receive an award under this section a business shall—

(1) submit a written application to the Commission, at such time, in such manner, and containing such information as the Commission may require, including at a minimum information that demonstrates that the business has made substantial effort to promote the opportunities and developmental experiences of women and minorities to foster advancement to management and decisionmaking positions within the business, including the elimination of artificial barriers to the advancement of women and minorities, and deserves special recognition as a consequence; and

(2) meet such additional requirements and specifications as the Commission determines to be appropriate.

(c) **MAKING AND PRESENTATION OF AWARD.**—

(1) **AWARD.**—After receiving recommendations from the Commission, the President or the designated representative of the President shall annually present the award described in subsection (a) to businesses that meet the qualifications described in subsection (b).

(2) **PRESENTATION.**—The President or the designated representative of the President shall present the award with such ceremonies as the President or the designated representative of the President may determine to be appropriate.

(3) **PUBLICITY.**—A business that receives an award under this section may publicize the receipt of the award and use the award in its advertising, if the business agrees to help

other United States businesses improve with respect to the promotion of opportunities and developmental experiences of women and minorities to foster the advancement of women and minorities to management and decisionmaking positions.

(d) **BUSINESS.**—For the purposes of this section, the term “business” includes—

(1)(A) a corporation including nonprofit corporations;

(B) a partnership;

(C) a professional association;

(D) a labor organization; and

(E) a business entity similar to an entity described in subparagraphs (A) through (D);

(2) an education referral program, a training program, such as an apprenticeship or management training program or a similar program; and

(3) a joint program formed by a combination of any entities described in paragraph (1) or (2).

SEC. 206. POWERS OF THE COMMISSION.

(a) **IN GENERAL.**—The Commission is authorized to—

(1) hold such hearings and sit and act at such times;

(2) take such testimony;

(3) have such printing and binding done;

(4) enter into such contracts and other arrangements;

(5) make such expenditures; and

(6) take such other actions;

as the Commission may determine to be necessary to carry out the duties of the Commission.

(b) **OATHS.**—Any member of the Commission may administer oaths or affirmations to witnesses appearing before the Commission.

(c) **OBTAINING INFORMATION FROM FEDERAL AGENCIES.**—The Commission may secure directly from any Federal agency such information as the Commission may require to carry out its duties.

(d) **VOLUNTARY SERVICE.**—Notwithstanding section 1342 of title 31, United States Code, the Chairperson of the

Commission may accept for the Commission voluntary services provided by a member of the Commission.

(e) **GIFTS AND DONATIONS.**—The Commission may accept, use, and dispose of gifts or donations of property in order to carry out the duties of the Commission.

(f) **USE OF MAIL.**—The Commission may use the United States mails in the same manner and under the same conditions as Federal agencies.

SEC. 207. CONFIDENTIALITY OF INFORMATION.

(a) **INDIVIDUAL BUSINESS INFORMATION.**—

(1) **IN GENERAL.**—Except as provided in paragraph (2), and notwithstanding section 552 of title 5, United States Code, in carrying out the duties of the Commission, including the duties described in sections 204 and 205, the Commission shall maintain the confidentiality of all information that concerns—

(A) the employment practices and procedures of individual businesses; or

(B) individual employees of the businesses.

(2) **CONSENT.**—The content of any information described in paragraph (1) may be disclosed with the prior written consent of the business or employee, as the case may be, with respect to which the information is maintained.

(b) **AGGREGATE INFORMATION.**—In carrying out the duties of the Commission, the Commission may disclose—

(1) information about the aggregate employment practices or procedures of a class or group of businesses; and

(2) information about the aggregate characteristics of employees of the businesses, and related aggregate information about the employees.

SEC. 208. STAFF AND CONSULTANTS.

(a) **STAFF.**—

(1) **APPOINTMENT AND COMPENSATION.**—The Commission may appoint and determine the compensation of

such staff as the Commission determines to be necessary to carry out the duties of the Commission.

(2) **LIMITATIONS.**—The rate of compensation for each staff member shall not exceed the daily equivalent of the rate specified for level V of the Executive Schedule under section 5316 of title 5, United States Code for each day the staff member is engaged in the performance of duties for the Commission. The Commission may otherwise appoint and determine the compensation of staff without regard to the provisions of title 5, United States Code, that govern appointments in the competitive service, and the provisions of chapter 51 and subchapter III of chapter 53 of title 5, United States Code, that relate to classification and General Schedule pay rates.

(b) **EXPERTS AND CONSULTANTS.**—The Chairperson of the Commission may obtain such temporary and intermittent services of experts and consultants and compensate the experts and consultants in accordance with section 3109(b) of title 5, United States Code, as the Commission determines to be necessary to carry out the duties of the Commission.

(c) **DETAIL OF FEDERAL EMPLOYEES.**—On the request of the Chairperson of the Commission, the head of any Federal agency shall detail, without reimbursement, any of the personnel of the agency to the Commission to assist the Commission in carrying out its duties. Any detail shall not interrupt or otherwise affect the civil service status or privileges of the Federal employee.

(d) **TECHNICAL ASSISTANCE.**—On the request of the Chairperson of the Commission, the head of a Federal agency shall provide such technical assistance to the Commission as the Commission determines to be necessary to carry out its duties.

SEC. 209. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated to the Commission such sums as may be necessary to carry out the provisions of this title. The sums shall remain available until expended, without fiscal year limitation.

SEC. 210. TERMINATION.

(a) **COMMISSION.**—Notwithstanding section 15 of the Federal Advisory Committee Act (5 U.S.C. App.), the Commission shall terminate 4 years after the date of the enactment of this Act.

(b) **AWARD.**—The authority to make awards under section 205 shall terminate 4 years after the date of the enactment of this Act.

TITLE III—GOVERNMENT EMPLOYEE RIGHTS

SEC. 301. GOVERNMENT EMPLOYEE RIGHTS ACT OF 1991.

(a) **SHORT TITLE.**—This title may be cited as the “Government Employee Rights Act of 1991”.

(b) **PURPOSE.**—The purpose of this title is to provide procedures to protect the right of Senate and other government employees, with respect to their public employment, to be free of discrimination on the basis of race, color, religion, sex, national origin, age, or disability.

(c) **DEFINITIONS.**—For purposes of this title:

(1) **SENATE EMPLOYEE.**—The term “Senate employee” or “employee” means—

(A) any employee whose pay is disbursed by the Secretary of the Senate;

(B) any employee of the Architect of the Capitol who is assigned to the Senate Restaurants or to the Superintendent of the Senate Office Buildings;

(C) any applicant for a position that will last 90 days or more and that is to be occupied by an individual described in subparagraph (A) or (B); or

(D) any individual who was formerly an employee described in subparagraph (A) or (B) and whose claim of a violation arises out of the individual’s Senate employment.

(2) **HEAD OF EMPLOYING OFFICE.**—The term “head of employing office” means the individual who has final authority to appoint, hire, discharge, and set the terms, conditions or privileges of the Senate employment of an employee.

(3) **VIOLATION.**—The term “violation” means a practice that violates section 302 of this title.

SEC. 302. DISCRIMINATORY PRACTICES PROHIBITED.

All personnel actions affecting employees of the Senate shall be made free from any discrimination based on—

(1) race, color, religion, sex, or national origin, within the meaning of section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16);

(2) age, within the meaning of section 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a); or

(3) handicap or disability, within the meaning of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791) and sections 102-104 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112-14).

SEC. 303. ESTABLISHMENT OF OFFICE OF SENATE FAIR EMPLOYMENT PRACTICES.

(a) **IN GENERAL.**—There is established, as an office of the Senate, the Office of Senate Fair Employment Practices (referred to in this title as the “Office”), which shall—

(1) administer the processes set forth in sections 305 through 307;

(2) implement programs for the Senate to heighten awareness of employee rights in order to prevent violations from occurring.

(b) **DIRECTOR.**—

(1) **IN GENERAL.**—The Office shall be headed by a Director (referred to in this title as the “Director”) who shall be appointed by the President pro tempore, upon the recommendation of the Majority Leader in consultation with

the Minority Leader. The appointment shall be made without regard to political affiliation and solely on the basis of fitness to perform the duties of the position. The Director shall be appointed for a term of service which shall expire at the end of the Congress following the Congress during which the Director is appointed. A Director may be reappointed at the termination of any term of service. The President pro tempore, upon the joint recommendation of the Majority Leader in consultation with the Minority Leader, may remove the Director at any time.

(2) **SALARY.**—The President pro tempore, upon the recommendation of the Majority Leader in consultation with the Minority Leader, shall establish the rate of pay for the Director. The salary of the Director may not be reduced during the employment of the Director and shall be increased at the same time and in the same manner as fixed statutory salary rates within the Senate are adjusted as a result of annual comparability increases.

(3) **ANNUAL BUDGET.**—The Director shall submit an annual budget request for the Office to the Committee on Appropriations.

(4) **APPOINTMENT OF DIRECTOR.**—The first Director shall be appointed and begin service within 90 days after the date of enactment of this Act, and thereafter the Director shall be appointed and begin service within 30 days after the beginning of the session of the Congress immediately following the termination of a Director's term of service or within 60 days after a vacancy occurs in the position.

(c) **STAFF OF THE OFFICE.**—

(1) **APPOINTMENT.**—The Director may appoint and fix the compensation of such additional staff, including hearing officers, as are necessary to carry out the purposes of this title.

(2) **DETAILEES.**—The Director may, with the prior consent of the Government department or agency concerned and the Committee on Rules and Administration, use on a reimbursable or nonreimbursable basis the services of any such department or agency, including the services of members

or personnel of the General Accounting Office Personnel Appeals Board.

(3) **CONSULTANTS.**—In carrying out the functions of the Office, the Director may procure the temporary (not to exceed 1 year) or intermittent services of individual consultants, or organizations thereof, in the same manner and under the same conditions as a standing committee of the Senate may procure such services under section 202(i) of the Legislative Reorganization Act of 1946 (2 U.S.C. 72a(i)).

(d) **EXPENSES OF THE OFFICE.**—In fiscal year 1992, the expenses of the Office shall be paid out of the Contingent Fund of the Senate from the appropriation account Miscellaneous Items. Beginning in fiscal year 1993, and for each fiscal year thereafter, there is authorized to be appropriated for the expenses of the Office such sums as shall be necessary to carry out its functions. In all cases, expenses shall be paid out of the Contingent Fund of the Senate upon vouchers approved by the Director, except that a voucher shall not be required for—

(1) the disbursement of salaries of employees who are paid at an annual rate;

(2) the payment of expenses for telecommunications services provided by the Telecommunications Department, Sergeant at Arms, United States Senate;

(3) the payment of expenses for stationery supplies purchased through the Keeper of the Stationery, United States Senate;

(4) the payment of expenses for postage to the Postmaster, United States Senate; and

(5) the payment of metered charges on copying equipment provided by the Sergeant at Arms, United States Senate.

The Secretary of the Senate is authorized to advance such sums as may be necessary to defray the expenses incurred in carrying out this title. Expenses of the Office shall include authorized travel for personnel of the Office.

(e) **RULES OF THE OFFICE.**—The Director shall adopt rules governing the procedures of the Office, including the procedures of hearing boards, which rules shall be submitted to the President pro tempore for publication in the Congressional Record. The rules may be amended in the same manner. The

Director may consult with the Chairman of the Administrative Conference of the United States on the adoption of rules.

(f) **REPRESENTATION BY THE SENATE LEGAL COUNSEL.**—For the purpose of representation by the Senate Legal Counsel, the Office shall be deemed a committee, within the meaning of title VII of the Ethics in Government Act of 1978 (2 U.S.C. 288, et seq.).

SEC. 304. SENATE PROCEDURE FOR CONSIDERATION OF ALLEGED VIOLATIONS.

The Senate procedure for consideration of alleged violations consists of 4 steps as follows:

- (1) Step I, counseling, as set forth in section 305.
- (1) Step II, mediation, as set forth in section 306.
- (3) Step III, formal complaint and hearing by a hearing board, as set forth in section 307.
- (4) Step IV, review of a hearing board decision, as set forth in section 308 or 309.

SEC. 305. STEP I: COUNSELING.

(a) **IN GENERAL.**—A Senate employee alleging a violation may request counseling by the Office. The Office shall provide the employee with all relevant information with respect to the rights of the employee. A request for counseling shall be made not later than 180 days after the alleged violation forming the basis of the request for counseling occurred. No request for counseling may be made until 10 days after the first Director begins service pursuant to section 303(b)(4).

(b) **PERIOD OF COUNSELING.**—The period for counseling shall be 30 days unless the employee and the Office agree to reduce the period. The period shall begin on the date the request for counseling is received.

(c) **EMPLOYEES OF THE ARCHITECT OF THE CAPITOL AND CAPITOL POLICE.**—In the case of an employee of the Architect of the Capitol or an employee who is a member of the Capitol Police, the Director may refer the employee to the Architect of the Capitol or the Capitol Police Board for resolution

of the employee's complaint through the internal grievance procedures of the Architect of the Capitol or the Capitol Police Board for a specific period of time, which shall not count against the time available for counseling or mediation under this title.

SEC. 306. STEP II: MEDIATION.

(a) **IN GENERAL.**—Not later than 15 days after the end of the counseling period, the employee may file a request for mediation with the Office. Mediation may include the Office, the employee, and the employing office in a process involving meetings with the parties separately or jointly for the purpose of resolving the dispute between the employee and the employing office.

(b) **MEDIATION PERIOD.**—The mediation period shall be 30 days beginning on the date the request for mediation is received and may be extended for an additional 30 days at the discretion of the Office. The Office shall notify the employee and the head of the employing office when the mediation period has ended.

SEC. 307. STEP III: FORMAL COMPLAINT AND HEARING.

(a) **FORMAL COMPLAINT AND REQUEST FOR HEARING.**—Not later than 30 days after receipt by the employee of notice from the Office of the end of the mediation period, the Senate employee may file a formal complaint with the Office. No complaint may be filed unless the employee has made a timely request for counseling and has completed the procedures set forth in sections 305 and 306.

(b) **HEARING BOARD.**—A board of 3 independent hearing officers (referred to in this title as "hearing board"), who are not Senators or officers or employees of the Senate, chosen by the Director (one of whom shall be designated by the Director as the presiding hearing officer) shall be assigned to consider each complaint filed under this section. The Director shall appoint hearing officers after considering any candidates who are recommended to the Director by the Federal Mediation and

Conciliation Service, the Administrative Conference of the United States, or organizations composed primarily of individuals experienced in adjudicating or arbitrating personnel matters. A hearing board shall act by majority vote.

(c) **DISMISSAL OF FRIVOLOUS CLAIMS.**—Prior to a hearing under subsection (d), a hearing board may dismiss any claim that it finds to be frivolous.

(d) **HEARING.**—A hearing shall be conducted—

(1) in closed session on the record by a hearing board;

(2) no later than 30 days after filing of the complaint under subsection (a), except that the Office may, for good cause, extend up to an additional 60 days the time for conducting a hearing; and

(3) except as specifically provided in this title and to the greatest extent practicable, in accordance with the principles and procedures set forth in sections 554 through 557 of title 5, United States Code.

(e) **DISCOVERY.**—Reasonable prehearing discovery may be permitted at the discretion of the hearing board.

(f) **SUBPOENA.**—

(1) **AUTHORIZATION.**—A hearing board may authorize subpoenas, which shall be issued by the presiding hearing officer on behalf of the hearing board, for the attendance of witnesses at proceedings of the hearing board and for the production of correspondence, books, papers, documents, and other records.

(2) **OBJECTIONS.**—If a witness refuses, on the basis of relevance, privilege, or other objection, to testify in response to a question or to produce records in connection with the proceedings of a hearing board, the hearing board shall rule on the objection. At the request of the witness, the employee, or employing office, or on its own initiative, the hearing board may refer the objection to the Select Committee on Ethics for a ruling.

(3) **ENFORCEMENT.**—The Select Committee on Ethics may make to the Senate any recommendations by report or resolution, including recommendations for criminal or civil enforcement by or on behalf of the Office, which the Select

Committee on Ethics may consider appropriate with respect to—

(A) the failure or refusal of any person to appear in proceedings under this or to produce records in obedience to a subpoena or order of the hearing board; or

(B) the failure or refusal of any person to answer questions during his or her appearance as a witness in a proceeding under this section.

For purposes of section 1365 of title 28, United States Code, the Office shall be deemed to be a committee of the Senate.

(g) **DECISION.**—The hearing board shall issue a written decision as expeditiously as possible, but in no case more than 45 days after the conclusion of the hearing. The written decision shall be transmitted by the Office to the employee and the employing office. The decision shall state the issues raised by the complaint, describe the evidence in the record, and contain a determination as to whether a violation has occurred.

(h) **REMEDIES.**—If the hearing board determines that a violation has occurred, it shall order such remedies as would be appropriate if awarded under section 706(g) and (k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(g) and (k)), and may also order the award of such compensatory damages as would be appropriate if awarded under section 1977 and section 1977A (a) and (b)(2) of the Revised Statutes (42 U.S.C. 1981 and 1981A (a) and (b)(2)). In the case of a determination that a violation based on age has occurred, the hearing board shall order such remedies as would be appropriate if awarded under section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)). Any order requiring the payment of money must be approved by a Senate resolution reported by the Committee on Rules and Administration. The hearing board shall have no authority to award punitive damages.

(i) **PRECEDENT AND INTERPRETATIONS.**—Hearing boards shall be guided by judicial decisions under statutes referred to in section 302 and subsection (h) of this section, as well as the precedents developed by the Select Committee on Ethics under section 308, and other Senate precedents.

SEC. 308. REVIEW BY THE SELECT COMMITTEE ON ETHICS.

(a) **IN GENERAL.**—An employee or the head of an employing office may request that the Select Committee on Ethics (referred to in this section as the "Committee"), or such other entity as the Senate may designate, review a decision under section 307, including any decision following a remand under subsection (c), by filing a request for review with the Office not later than 10 days after the receipt of the decision of a hearing board. The Office, at the discretion of the Director, on its own initiative and for good cause, may file a request for review by the Committee of a decision of a hearing board not later than 5 days after the time for the employee or employing office to file a request for review has expired. The Office shall transmit a copy of any request for review to the Committee and notify the interested parties of the filing of the request for review.

(b) **REVIEW.**—Review under this section shall be based on the record of the hearing board. The Committee shall adopt and publish in the Congressional Record procedures for requests for review under this section.

(c) **REMAND.**—Within the time for a decision under subsection (d), the Committee may remand a decision no more than one time to the hearing board for the purpose of supplementing the record or for further consideration.

(d) **FINAL DECISION.**—

(1) **HEARING BOARD.**—If no timely request for review is filed under subsection (a), the Office shall enter as a final decision, the decision of the hearing board.

(2) **SELECT COMMITTEE ON ETHICS.**—

(A) If the Committee does not remand under subsection (c), it shall transmit a written final decision to the Office for entry in the records of the Office. The Committee shall transmit the decision not later than 60 calendar days during which the Senate is in session after the filing of a request for review under subsection (a). The Committee may extend for 15 calendar days during which the Senate is in session the period for transmission to the Office of a final decision.

(B) The decision of the hearing board shall be deemed to be a final decision, and entered in the records of the Office as a final decision, unless a majority of the Committee votes to reverse or remand the decision of the hearing board within the time for transmission to the Office of a final decision.

(C) The decision of the hearing board shall be deemed to be a final decision, and entered in the records of the Office as a final decision, if the Committee, in its discretion, decides not to review, pursuant to a request for review under subsection (a), a decision of the hearing board, and notifies the interested parties of such decision.

(3) **ENTRY OF A FINAL DECISION.**—The entry of a final decision in the records of the Office shall constitute a final decision for purposes of judicial review under section 309.

(e) **STATEMENT OF REASONS.**—Any decision of the Committee under subsection (c) or subsection (d)(2)(A) shall contain a written statement of the reasons for the Committee's decision.

SEC. 309. JUDICIAL REVIEW.

(a) **IN GENERAL.**—Any Senate employee aggrieved by a final decision under section 308(d), or any Member of the Senate who would be required to reimburse the appropriate Federal account pursuant to the section entitled "Payments by the President or a Member of the Senate" and a final decision entered pursuant to section 308(d)(2)(B), may petition for review by the United States Court of Appeals for the Federal Circuit.

(b) **LAW APPLICABLE.**—Chapter 158 of title 28, United States Code, shall apply to a review under this section except that—

(1) with respect to section 2344 of title 28, United States Code, service of the petition shall be on the Senate Legal Counsel rather than on the Attorney General;

(2) the provisions of section 2348 of title 28, United States Code, on the authority of the Attorney General, shall not apply;

(3) the petition for review shall be filed not later than 90 days after the entry in the Office of a final decision under section 308(d);

(4) the Office shall be an "agency" as that term is used in chapter 158 of title 28, United States Code; and

(5) the Office shall be the respondent in any proceeding under this section.

(c) **STANDARD OF REVIEW.**—To the extent necessary to decision and when presented, the court shall decide all relevant questions of law and interpret constitutional and statutory provisions. The court shall set aside a final decision if it is determined that the decision was—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law;

(2) not made consistent with required procedures; or

(3) unsupported by substantial evidence.

In making the foregoing determinations, the court shall review the whole record, or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. The record on review shall include the record before the hearing board, the decision of the hearing board, and the decision, if any, of the Select Committee on Ethics.

(d) **ATTORNEY'S FEES.**—If an employee is the prevailing party in a proceeding under this section, attorney's fees may be allowed by the court in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C.2000e-5k)).

SEC. 310. RESOLUTION OF COMPLAINT.

If, after a formal complaint is filed under section 307, the employee and the head of the employing office resolve the issues involved, the employee may dismiss the complaint or the parties may enter into a written agreement, subject to the approval of the Director.

SEC. 311. COSTS OF ATTENDING HEARINGS.

Subject to the approval of the Director, an employee with respect to whom a hearing is held under this title may be reimbursed for actual and reasonable costs of attending proceedings under sections 307 and 308, consistent with Senate travel regulations. Senate Resolution 259, agreed to August 5, 1987 (100th Congress, 1st Session), shall apply to witnesses appearing in proceedings before a hearing board.

SEC. 312. PROHIBITION OF INTIMIDATION.

Any intimidation of, or reprisal against, any employee by any Member, officer, or employee of the Senate, or by the Architect of the Capitol, or anyone employed by the Architect of the Capitol, as the case may be, because of the exercise of a right under this title constitutes an unlawful employment practice, which may be remedied in the same manner under this title as is a violation.

SEC. 313. CONFIDENTIALITY.

(a) **COUNSELING.**—All counseling shall be strictly confidential except that the Office and the employee may agree to notify the head of the employing office of the allegations.

(b) **MEDIATION.**—All mediation shall be strictly confidential.

(c) **HEARINGS.**—Except as provided in subsection (d), the hearings, deliberations, and decisions of the hearing board and the Select Committee on Ethics shall be confidential.

(d) **FINAL DECISION OF SELECT COMMITTEE ON ETHICS.**—The final decision of the Select Committee on Ethics under section 308 shall be made public if the decision is in favor of the complaining Senate employee or if the decision reverses a decision of the hearing board which had been in favor of the employee. The Select Committee on Ethics may decide to release any other decision at its discretion. In the absence of a proceeding under section 308, a decision of the hearing board that is favorable to the employee shall be made public.

(e) **RELEASE OF RECORDS FOR JUDICIAL REVIEW.**—The records and decisions of hearing boards, and the decisions of the Select Committee on Ethics, may be made public if required for the purpose of judicial review under section 309.

SEC. 314. EXERCISE OF RULEMAKING POWER.

The provisions of this title, except for sections 309, 320, 321, and 322, are enacted by the Senate as an exercise of the rulemaking power of the Senate, with full recognition of the right of the Senate to change its rules, in the same manner, and to the same extent, as in the case of any other rule of the Senate. Notwithstanding any other provision of law, except as provided in section 309, enforcement and adjudication with respect to the discriminatory practices prohibited by section 302, and arising out of Senate employment, shall be within the exclusive jurisdiction of the United States Senate.

SEC. 315. TECHNICAL AND CONFORMING AMENDMENTS.

Section 509 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12209) is amended—

- (1) in subsection (a)—
 - (A) by striking paragraphs (2) through (5);
 - (B) by redesignating paragraphs (6) and (7) as paragraphs (2) and (3), respectively; and
 - (C) in paragraph (3), as redesignated by subparagraph (B) of this paragraph—
 - (i) by striking “(2) and (6)(A)” and inserting “(2)(A)”, as redesignated by subparagraph (B) of this paragraph; and
 - (ii) by striking “(3), (4), (5), (6)(B), and (6)(C)” and inserting “(2)”; and
- (2) in subsection (c)(2), by inserting “, except for the employees who are defined as Senate employees, in section 301(c)(1) of the Civil Rights Act of 1991” after “shall apply exclusively”.

SEC. 316. POLITICAL AFFILIATION AND PLACE OF RESIDENCE.

(a) **IN GENERAL.**—It shall not be a violation with respect to an employee described in subsection (b) to consider the—

- (1) party affiliation;
- (2) domicile; or
- (3) political compatibility with the employing office, of such an employee with respect to employment decisions.

(b) **DEFINITION.**—For purposes of this section, the term “employee” means—

- (1) an employee on the staff of the Senate leadership;
- (2) an employee on the staff of a committee or subcommittee;
- (3) an employee on the staff of a Member of the Senate;
- (4) an officer or employee of the Senate elected by the Senate or appointed by a Member, other than those described in paragraphs (1) through (3); or
- (5) an applicant for a position that is to be occupied by an individual described in paragraphs (1) through (4).

SEC. 317. OTHER REVIEW.

No Senate employee may commence a judicial proceeding to redress discriminatory practices prohibited under section 302 of this title, except as provided in this title.

SEC. 318. OTHER INSTRUMENTALITIES OF THE CONGRESS.

It is the sense of the Senate that legislation should be enacted to provide the same or comparable rights and remedies as are provided under this title to employees of instrumentalities of the Congress not provided with such rights and remedies.

SEC. 319. RULE XLII OF THE STANDING RULES OF THE SENATE.

(a) **REAFFIRMATION.**—The Senate reaffirms its commitment to Rule XLII of the Standing Rules of the Senate, which provides as follows:

“No Member, officer, or employee of the Senate shall, with respect to employment by the Senate or any office thereof—

“(a) fail or refuse to hire an individual;

“(b) discharge an individual; or

“(c) otherwise discriminate against an individual with respect to promotion, compensation, or terms, conditions, or privileges of employment

on the basis of such individual's race, color, religion, sex, national origin, age, or state of physical handicap.”.

(b) **AUTHORITY TO DISCIPLINE.**—Notwithstanding any provision of this title, including any provision authorizing orders for remedies to Senate employees to redress employment discrimination, the Select Committee on Ethics shall retain full power, in accordance with its authority under Senate Resolution 338, 88th Congress, as amended, with respect to disciplinary action against a Member, officer, or employee of the Senate for a violation of Rule XLII.

SEC. 320. COVERAGE OF PRESIDENTIAL APPOINTEES.

(a) **IN GENERAL.**—

(1) **APPLICATION.**—The rights, protections, and remedies provided pursuant to section 302 and 307(h) of this title shall apply with respect to employment of Presidential appointees.

(2) **ENFORCEMENT BY ADMINISTRATIVE ACTION.**—Any Presidential appointee may file a complaint alleging a violation, not later than 180 days after the occurrence of the alleged violation, with the Equal Employment Opportunity Commission, or such other entity as is designated by the President by Executive Order, which, in accordance with the principles and procedures set forth in sections 554 through 557 of title 5, United States Code, shall

determine whether a violation has occurred and shall set forth its determination in a final order. If the Equal Employment Opportunity Commission, or such other entity as is designated by the President pursuant to this section, determines that a violation has occurred, the final order shall also provide for appropriate relief.

(3) **JUDICIAL REVIEW.**—

(A) **IN GENERAL.**—Any party aggrieved by a final order under paragraph (2) may petition for review by the United States Court of Appeals for the Federal Circuit.

(B) **LAW APPLICABLE.**—Chapter 158 of title 28, United States Code, shall apply to a review under this section except that the Equal Employment Opportunity Commission or such other entity as the President may designate under paragraph (2) shall be an “agency” as that term is used in chapter 158 of title 28, United States Code.

(C) **STANDARD OF REVIEW.**—To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law and interpret constitutional and statutory provisions. The court shall set aside a final order under paragraph (2) if it is determined that the order was—

(i) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law;

(ii) not made consistent with required procedures; or

(iii) unsupported by substantial evidence.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(D) **ATTORNEY'S FEES.**—If the presidential appointee is the prevailing party in a proceeding under this section, attorney's fees may be allowed by the court in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

(b) **PRESIDENTIAL APPOINTEE.**—For purposes of this section, the term “Presidential appointee” means any officer or employee, or an applicant seeking to become an officer or

employee, in any unit of the Executive Branch, including the Executive Office of the President, whether appointed by the President or by any other appointing authority in the Executive Branch, who is not already entitled to bring an action under any of the statutes referred to in section 302 but does not include any individual—

- (1) whose appointment is made by and with the advice and consent of the Senate;
- (2) who is appointed to an advisory committee, as defined in section 3(2) of the Federal Advisory Committee Act (5 U.S.C. App.); or
- (3) who is a member of the uniformed services.

SEC. 321. COVERAGE OF PREVIOUSLY EXEMPT STATE EMPLOYEES.

(a) APPLICATION.—The rights, protections, and remedies provided pursuant to section 302 and 307(h) of this title shall apply with respect to employment of any individual chosen or appointed, by a person elected to public office in any State or political subdivision of any State by the qualified voters thereof—

- (1) to be a member of the elected official's personal staff;
- (2) to serve the elected official on the policymaking level;

or

- (3) to serve the elected official as an immediate advisor with respect to the exercise of the constitutional or legal powers of the office.

(b) ENFORCEMENT BY ADMINISTRATIVE ACTION.—

- (1) IN GENERAL.—Any individual referred to in subsection (a) may file a complaint alleging a violation, not later than 180 days after the occurrence of the alleged violation, with the Equal Employment Opportunity Commission, which, in accordance with the principles and procedures set forth in sections 554 through 557 of title 5, United States Code, shall determine whether a violation has occurred and shall set forth its determination in a final order. If the Equal Employment Opportunity Commission determines that a violation has occurred, the final order shall also provide for appropriate relief.

(2) REFERRAL TO STATE AND LOCAL AUTHORITIES.—

(A) APPLICATION.—Section 706(d) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5d)) shall apply with respect to any proceeding under this section.

(B) DEFINITION.—For purposes of the application described in subparagraph (A), the term “any charge filed by a member of the Commission alleging an unlawful employment practice” means a complaint filed under this section.

(c) JUDICIAL REVIEW.—Any party aggrieved by a final order under subsection (b) may obtain a review of such order under chapter 158 of title 28, United States Code. For the purpose of this review, the Equal Employment Opportunity Commission shall be an “agency” as that term is used in chapter 158 of title 28, United States Code.

(d) STANDARD OF REVIEW.—To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law and interpret constitutional and statutory provisions. The court shall set aside a final order under subsection (b) if it is determined that the order was—

- (1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law;
- (2) not made consistent with required procedures; or
- (3) unsupported by substantial evidence.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(e) ATTORNEY'S FEES.—If the individual referred to in subsection (a) is the prevailing party in a proceeding under this subsection, attorney's fees may be allowed by the court in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5k)).

SEC. 322. SEVERABILITY.

Notwithstanding section 401 of this Act, if any provision of section 309 or 320(a)(3) is invalidated, both sections 309 and 320(a)(3) shall have no force and effect.

SEC. 323. PAYMENTS BY THE PRESIDENT OR A MEMBER OF THE SENATE.

The President or a Member of the Senate shall reimburse the appropriate Federal account for any payment made on his or her behalf out of such account for a violation committed under the provisions of this title by the President or Member of the Senate not later than 60 days after the payment is made.

SEC. 324. REPORTS OF SENATE COMMITTEES.

(a) Each report accompanying a bill or joint resolution of a public character reported by any committee of the Senate (except the Committee on Appropriations and the Committee on the Budget) shall contain a listing of the provisions of the bill or joint resolution that apply to Congress and an evaluation of the impact of such provisions on Congress.

(b) The provisions of this section are enacted by the Senate as an exercise of the rulemaking power of the Senate, with full recognition of the right of the Senate to change its rules, in the same manner, and to the same extent, as in the case of any other rule of the Senate.

SEC. 325. INTERVENTION AND EXPEDITED REVIEW OF CERTAIN APPEALS.

(a) **INTERVENTION.**—Because of the constitutional issues that may be raised by section 309 and section 320, any Member of the Senate may intervene as a matter of right in any proceeding under section 309 for the sole purpose of determining the constitutionality of such section.

(b) **THRESHOLD MATTER.**—In any proceeding under section 309 or section 320, the United States Court of Appeals for the Federal Circuit shall determine any issue presented concerning the constitutionality of such section as a threshold matter.

(c) **APPEAL.**—

(1) **IN GENERAL.**—An appeal may be taken directly to the Supreme Court of the United States from any interlocutory or final judgment, decree, or order issued by the

United States Court of Appeals for the Federal Circuit ruling upon the constitutionality of section 309 or 320.

(2) **JURISDICTION.**—The Supreme Court shall, if it has not previously ruled on the question, accept jurisdiction over the appeal referred to in paragraph (1), advance the appeal on the docket and expedite the appeal to the greatest extent possible.

TITLE IV—GENERAL PROVISIONS

SEC. 401. SEVERABILITY.

If any provision of this Act, or an amendment made by this Act, or the application of such provision to any person or circumstances is held to be invalid, the remainder of this Act and the amendments made by this Act, and the application of such provision to other persons and circumstances, shall not be affected.

SEC. 402. EFFECTIVE DATE.

(a) **IN GENERAL.**—Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment.

(b) **CERTAIN DISPARATE IMPACT CASES.**—Notwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983.

**TITLE V—CIVIL WAR SITES ADVISORY
COMMISSION**

SEC. 501. CIVIL WAR SITES ADVISORY COMMISSION.

Section 1205 of Public Law 101-628 is amended in subsection (a) by—

(1) striking “Three” in paragraph (4) and inserting “Four” in lieu thereof; and

(2) striking “Three” in paragraph (5) and inserting “Four” in lieu thereof.

Approved November 21, 1991.

(11)
No. 92-757

Supreme Court, U.S.

FILE

JUN 25 1993

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

BARBARA LANDGRAF,
Petitioner,
v.

USI FILM PRODUCTS,
BONAR PACKAGING, INC., and
QUANTUM CHEMICAL CORPORATION,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

BRIEF FOR RESPONDENTS

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June 25, 1993

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QUESTION PRESENTED

Does the Civil Rights Act of 1991 apply retroactively to cases pending when the Act became law so as to entitle Petitioner to the redress provided in Section 102 of the Act?

PARENTS AND SUBSIDIARIES

The Respondents were defendants-appellees below. Quantum Chemical Corporation is a Virginia corporation and a publicly traded company. USI Film Products was a manufacturing plant in the USI Division of Quantum. Bonar Packaging, Inc., is a Canadian corporation and purchased the USI Film Products plant from Quantum subsequent to Petitioner's resignation from employment at the plant. Quantum does not have any parent company. Quantum has the following non-wholly-owned subsidiary companies:

Atlantic Energy, Inc.
 CUE Insurance Limited
 Fallon Propane and Butane Company
 Northwest L.P.G. Supply Ltd.
 Petrolane Finance Corp.
 Petrolane Gas Service L.P.
 Petrolane Incorporated
 Quantum Petrochemical Corporation Limited

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-757

BARBARA LANDGRAF,
v. *Petitioner,*

USI FILM PRODUCTS,
BONAR PACKAGING, INC., and
QUANTUM CHEMICAL CORPORATION,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit**

BRIEF FOR RESPONDENTS

STATUTE INVOLVED

The case involves the Civil Rights Act of 1991 ("the Act" or "1991 Act"), Publ. L. No. 102-166, 105 Stat. 1071 (1991). (Appendix B to Petition For Certiorari) The specific provision at issue in this case is Section 102 of the Act.

STATEMENT OF THE CASE

While working for the USI Film Products plant in Tyler, Texas, Barbara Landgraf ("Landgraf" or "Petitioner") was subjected to sexual harassment by a fellow employee, John Williams. (Joint Appendix ("Jt.App.") 9, ¶ I.1) When Landgraf notified her immediate super-

visor, Bobby Martin, about the harassment, he did not respond. (Jt.App. 9, ¶ I.2,3) Landgraf reported the harassment to Sam Forsgard, who handled personnel matters at USI. He investigated immediately. (Jt.App. 9-10, ¶ 4, 5) Williams was given the plant's most serious form of written reprimand and transferred to another department in order to reduce his contact with Landgraf. (Jt.App. 9-10, ¶ 6; 22) Landgraf was told to notify Forsgard if Williams continued to bother her; she reported no such incidents to USI. (Jt.App. 21-22) The plant's remedial measures alleviated the harassment Landgraf had been subjected to by her co-worker Williams. (Jt.App. 10, ¶ 6)

Landgraf resigned in January 1986, a few days after the plant instituted its remedial measures. (Jt.App. 10, ¶ 7) Her letter of resignation made no reference to Williams or the harassment. (Jt.App. 2)

Later in 1986, Landgraf filed a charge with the Equal Employment Opportunity Commission ("EEOC"), alleging a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, because of Williams' harassment and her resignation, which she attributed to the plant's discriminatory work environment. (Jt.App. 3-4) The EEOC subsequently issued a determination finding that her co-worker Williams had sexually harassed her; that after Landgraf had reported the harassment, the plant transferred Williams and issued him written discipline, so that "Respondent provided remedy on its own initiative" (Jt.App. 4); and that Landgraf resigned "because she was unable to get along with other co-workers." (Jt.App. 5) The determination found that "no additional relief is necessary" because "Respondent undertook prompt remedial action," and that her resignation was not a constructive discharge. (Jt.App. 5) The determination was issued September 15, 1988.

Landgraf brought suit under Title VII in the United States District Court for the Eastern District of Texas.

She also sought relief under pendent state law claims, which were dismissed as untimely. (Jt.App. 13, ¶ 8) The matter was tried to the court. In its findings of fact, conclusions of law and judgment (Jt.App. 9-14), the district court found that Landgraf was subjected to sexual harassment by Williams, her fellow employee, by which she suffered mental anguish; that when she reported it to Forsgard he "immediately conducted an appropriate investigation" and responded; that "[t]he remedial measures instituted by Forsgard alleviated the harassment;" that "at the time Landgraf resigned from her job, USI had taken steps . . . to eliminate the hostile working environment arising from the sexual harassment;" and that Landgraf was motivated to resign by her conflicts and unpleasant relationships with co-workers generally. (Jt.App. 9-10, ¶¶ I.1, 10, 5, 6, II.6) As a matter of law, the district court found that her resignation was not a constructive discharge (Jt.App. 11, ¶ II.6) and that Landgraf was not entitled to any damages remedy under 42 U.S.C. § 2000e-5(g), quoting from *Bohen v. East Chicago*, 799 F.2d 1180, 1184 (7th Cir. 1986):

"[N]o damages are available under Title VII. If Congress wishes to amend the provisions of Title VII to provide a remedy of damages, it can do so. Until then, this court may only enforce the statute as written, and as currently written Title VII does not contemplate damages."

(Jt.App. 12, ¶ 7) Judgment was entered May 22, 1991. (Jt.App. 14)

Landgraf appealed. After briefing on the appeal was completed, and while the appeal was pending oral argument, the Civil Rights Act of 1991 was enacted on November 21, 1991.

On February 6, 1992, Landgraf's counsel sent a letter to the court of appeals, stating in pertinent part:

Recent amendments to Title VII, 42 U.S.C. § 2000e *et seq.*, contained in the Civil Rights Act of

1991 may bear on the issues before the Court in the above referenced matter. The Civil Rights Act of 1991 has become law since the briefs of the parties were filed.

Please bring this matter to the Court's attention.
(Jt.App. 17-18)

Following oral argument, the court of appeals affirmed the district court's decision. (Jt.App. 19-28) *Landgraf v. USI Film Products, et al.*, 968 F.2d 427 (5th Cir. 1992). The court rejected Landgraf's claim of constructive discharge, noting:

Although USI's investigation of this incident may not have been overly sensitive to Landgraf's state of mind, the company had taken steps to alleviate the situation and told Landgraf to let them know of any further problems. A reasonable employee would not have felt compelled to resign immediately following the institution of measures which the district court found to be reasonably calculated to stop the harassment.

(Jt.App. 23-24) The court also rejected her claim for damages, because "[w]e have consistently interpreted [42 U.S.C. § 2000e-5(g)] to mean that 'only equitable relief is available under Title VII'" and "damages . . . are legal, not equitable relief. . . ." (Jt.App. 25)

The court below found that Section 102 of the Civil Rights Act of 1991, providing for compensatory and punitive damages, with right of jury trial, did not apply retroactively. Finding "no clear congressional intent on the general issue of the Act's application to pending cases," the court turned to legal principles involving retroactivity. Recognizing that such principles were "somewhat uncertain" in light of *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988), and *Bradley v. School Board*, 416 U.S. 696 (1974), the court, applying the *Bradley* standard *arguendo*, held that the provisions of Section 102 "should not be applied retroactively to this case." (Jt.App. 26-27)

The court rejected retroactive application of the jury trial provisions: "We are not persuaded that Congress intended to upset cases which were properly tried under the law at the time of trial. . . . To require USI to retry this case because of a statutory change enacted after the trial was completed would be an injustice and a waste of judicial resources." (Jt.App. 27)

The court found similarly for the compensatory and punitive damage provisions of Section 102:

Retroactive application of this provision to conduct occurring before the Act would result in a manifest injustice. . . . Unlike allowing prevailing plaintiffs to recover attorneys' fees as in *Bradley*, the amended damage provisions of the Act are a seachange in employer liability for Title VII violations. . . .

. . . There is a practical point at which a dramatic change in the remedial consequences of a rule works change in the normative reach of the rule itself. It would be an injustice within the meaning of *Bradley* to charge individual employers with anticipating this change in damages available under Title VII. . . . [They] impose 'an additional or unforeseeable obligation' contrary to the well-settled law before the amendments.

(Jt.App. 27-28)

SUMMARY OF THE ARGUMENT

The law does not favor retroactivity. Statutes are presumed to apply only prospectively to human conduct, unless Congress provides to the contrary using words that are clear, strong and imperative, of unequivocal and inflexible import, manifestly evidencing a Congressional intent for retroactive application and requiring that result.

The Civil Rights Act of 1991 does not satisfy the standard for retroactive application. Its language does not provide for retroactive application, and efforts to

draw negative inferences from its provisions are both erroneous and insufficient to establish the necessary manifest intention. Its legislative drafting path demonstrates an intentional Congressional choice against retroactivity, and its legislative history either supports prospective application or is at worst of no value in divining legislative intent.

Petitioner's use of *Bradley* and *Thorpe v. Housing Auth.*, 393 U.S. 268 (1969), to attempt to reverse the ancient principle disfavoring retroactive legislation, by using those cases to call for a presumption in favor of retroactivity, leads to unjust and unwise results and should not be countenanced. The use of *Bradley* and *Thorpe* by litigants and the resulting confusion in the lower courts should be brought to a halt by a reaffirmation of the principle that absent clear Congressional direction to the contrary, statutes regulating human conduct have only prospective operation. To the extent that they are inconsistent with that fundamental principle of jurisprudence, *Bradley* and *Thorpe* should be disapproved.

Even applying the *Bradley* analysis *arguendo*, the provisions of Section 102 of the 1991 Act should not be applied retroactively. Their creation as part of the Act and its effective date provisions evidenced a legislative choice against retroactivity. They add a tort-like cause of action to Title VII, which previously provided only for restitutionary, equitable relief; as such, they affect substantive rights and liabilities. And their retroactive application to human conduct and trials occurring before their enactment would create manifest injustice.

Prospective application, recognizing a new right to different damages flowing from Congress' new conception of injury to be redressed by Title VII, will advance the Congressional purposes of the 1991 Act by providing new regulation of human conduct.

ARGUMENT¹

Petitioner asks the Court to find that the new punitive damage, compensatory damage and related jury trial provisions of Section 102 of the Act apply retroactively to her case because it was pending appeal when the Act was passed. Her cause below addressed human actions that occurred in the winter of 1985-1986; was filed in court under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, in 1989 (with no claim under Title VII for compensatory or punitive damages or jury trial);² was tried in February 1991; and was on appeal pending decision when the Act became law in November 1991. Petitioner asks the Court to hold that Section 102 should be applied retroactively, in order that she now might make a new claim of injury under Title VII for which she seeks compensatory and punitive damages, determined by a jury, based on those human actions that occurred before, and were tried before, the Act became law. Her request should fail, because Section 102 of the Act does not and should not apply retroactively to pending cases involving human conduct or trials occurring before the Act's effective date.

¹ In its Brief, Roadway Express, Inc., Respondent in *Rivers v. Roadway Express, Inc.*, No. 92-938, has addressed exhaustively various issues common to these consolidated cases. In order not to burden the Court with redundant argument, Respondents in this case join in Roadway's Brief and will not repeat here the arguments made there, which are incorporated herein by reference.

² Petitioner sought no compensatory or punitive damages or other legal relief under Title VII. Petitioner sought equitable relief under Title VII and compensatory and punitive damages under pendent state common law claims. At trial, Petitioner conceded that her state common law claims were barred by the applicable statute of limitations, and the district court dismissed those claims with prejudice. (Jt. App. 13, ¶ 8)

I. SECTION 102 OF THE ACT DOES NOT APPLY TO PENDING CASES

A. Retroactivity Is Not Favored In The Law

"Retroactivity is not favored in the law." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. at 208. "Retroactivity, even where permissible, is not favored, except upon the clearest mandate." *Claridge Apartments Co. v. Commissioner*, 323 U.S. 141, 164 (1944). The principle is not new. It finds expression in ancient texts, English common law, Constitutional doctrine (the test of due process, the ex post facto and bill of attainder prohibitions), this Court's rules of statutory construction, and simple fairness.

The non-retroactivity principle is a fundamental tenet of American jurisprudence. In the criminal sphere of the law, the principle is embodied in a flat constitutional prohibition of ex post facto laws. In the civil area, the non-retroactivity principle antedates the Constitution itself:

It is a principle in the English law, as ancient as the law itself, that a statute, even of its omnipotent Parliament, is not to have a retrospective effect.

Dash v. Van Kleeck, 7 Johns. 477, 503 (1811). The non-retroactivity principle is embodied in the ancient maxim *Nova Constitutio Futuris Formam Imponere Debet, Et Non Praeteritis* ("a new state of the law ought to affect the future, not the past"). It is a principle that has been embraced by the greatest scholars in our legal history, e.g., Story, J., *Commentaries on the Constitution* § 1398 (1873) ("retrospective laws are . . . generally unjust, and . . . neither accord with sound legislation nor with the fundamental principles of the social compact.").

It is a principle that has been taken for granted by the distinguished members of this Court for generation upon generation. Chief Justice Marshall declared:

It is a principle which has always been held sacred in the United States, that laws by which human action is to be regulated look forwards, not backwards; and are never to be construed retrospectively, unless the language of the act shall render such construction indispensable. No words are found in the act of 1818, which render this odious construction indispensable.

Reynolds v. M'Arthur, 27 U.S. (2 Pet.) 417, 434 (1829). A century later, Justice Brandeis, writing for the Court, observed:

That a statute shall not be given retroactive effect, unless such construction is required by explicit language or by necessary implication, is a rule of general application.

United States v. St. Louis, S. F. & T. R.R., 270 U.S. 1, 3 (1926).

B. Congressional Action Must Meet A Strict Standard In Order To Operate Retrospectively

Given the principle disfavoring retroactivity, there is a standard which legislation by Congress must meet in order to operate retrospectively. "[C]ongressional enactments . . . will not be construed to have retroactive effect unless their language *requires* this result." *Bowen*, 488 U.S. at 208 (emphasis added). A statute "ought never to receive such a [retroactive] construction *if it is susceptible of any other*." *United States Fidelity & Guaranty Co. v. United States ex rel. Struthers Wells Co.*, 209 U.S. 306, 314 (1908) (emphasis added). Rather, "[w]ords used in a statute ought not to have a retrospective operation, unless they are so *clear, strong and imperative*, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied." *United States v. Heth*, 1 U.S. (3 Cranch) 399, 413 (1806) (emphasis added). Therefore, "a retrospective operation will not be given to a statute which interferes with antecedent rights or *by which human action is regulated*, unless such be the *'unequivocal and inflexible im-*

port of the terms, and the *manifest intention* of the legislature.' " *Union Pacific R.R. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913) (emphasis added) (quoting *Heth*, at 413).

C. The Civil Rights Act of 1991 Does Not Meet The Standard

The Civil Rights Act of 1991, including the new jury trial and compensatory and punitive damage provisions of Section 102, does not satisfy this standard. Its language does not require such a result; it is susceptible of other construction. Its words are not clear, strong and imperative; other meanings can be annexed to them. The import of its terms are not unequivocal and inflexible; and the intentions of its enacting Congress are anything but manifest.

1. The Language Of The Act Does Not Require Retroactivity

Section 402(a) speaks to the "Effective Date" of the Act. It states: "Except as otherwise specifically provided this Act and the amendments made by this Act shall take effect upon enactment." Enactment occurred on November 21, 1991.³

This language certainly does not require retroactivity. The words are not so "clear, strong and imperative" as to apply the Act retroactively; the words do not speak to retroactivity at all. They are not "unequivocal and inflexible" in compelling the application of the Act retroactively to the facts of a pending case, the human action of which occurred years before the Act; the words do not speak to pending cases at all. On their face, the

³ Read in common sense terms, the Act and its amendments would take effect to regulate human conduct that occurs on or after November 21, 1991, not before. "That seems to us to be the common sense of the matter; and common sense often makes good law." *Peak v. United States*, 353 U.S. 43, 46 (1957).

words of Section 402(a) of the Act stated by Congress to establish its effect say nothing at all about pending cases or retroactivity. The reader cannot find a requirement of retroactivity in its words.

Unable to draw comfort from the language of Section 402(a), Petitioner attempts to draw negative inferences from its language and legislative history. Neither leads to a conclusion of retroactive application:⁴

- The qualifying language of Section 402(a)—"Except as otherwise specifically provided"—has a purpose. Sections 102(a)(2) and (3) of the Act, 42 U.S.C. §§ 1981a(2) and (3), addressed intentional discrimination under the Americans With Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 *et seq.* Section 108 of the ADA, 42 U.S.C. § 12111, "otherwise specifically provided" that the employment provisions of the ADA did not become effective until July 26, 1992, well after the enactment of the Civil Rights Act of 1991. Absent the qualifying language of Section 402(a), the damages provisions of Section 102(a)(2) and (3) of the 1991 Civil Rights Act would have been effective before the ADA itself. That would be absurd.⁵

- Petitioner argues that Section 109(c) (coverage of expatriates) and Section 402(b) (effectively, the *Ward's Cove* litigation) are prospective, so that the rest of the Act must be applied retroactively. It is not so. They are isolated pieces of the statute: one originated in a version of the bill which was expressly retroactive; the other was a late amendment whose proponents made clear its presence was not in derogation of the prospective effect

⁴ See the Brief of Roadway Express, Inc., pp. 16-24.

⁵ *Cf. United States v. Wurts*, 303 U.S. 414, 418 (1938) ("It would require language so clear as to leave room for no other reasonable construction in order to induce the belief that Congress intended a statute of limitations to begin to run before the right barred by it has accrued").

of the Act. They both survived into the final statute as insurance policies for specific situations. Both sections are susceptible of other construction and can have other meanings annexed to them. *United States Fidelity & Guaranty Co.*, 209 U.S. at 314; *Heth*, 1 U.S. (3 Cranch) at 413.⁶

• The Act is redundant already (Section 110(b) needlessly restates Section 402(a)). Section 402(b) and Section 109(c) easily can be interpreted as having a purpose to be redundant for emphasis. *Massachusetts v. Morash*, 490 U.S. 107, 113 n.9 (1989) ("Congress was not concerned with duplication").

Properly read and interpreted, the Act is prospective; it does not apply to pending cases. But even assuming *arguendo* that the Act can be read to have two meanings, the principle that retroactivity is not favored argues that the meaning which rejects retroactivity must be applied:

The initial admonition is that laws are not to be considered as applying to cases which arose before their passage unless that intention be clearly declared. . . . If the absence of such determining dec-

⁶ Petitioner (Pet. Br. at 10, n.7) argues that Section 108(n)(2)(A) and (B) also demonstrate retroactive operation of the Act. The argument is tortured, and it fails. Section 108 looks prospectively, to reduce challenges to litigated or consent judgments or orders that are being implemented through employment practices. Subsection (2)(A) preserves standards of intervention when such a judgment or order is challenged; subsection (2)(B) protects the rights of certain parties to the proceeding in the event of such a challenge. Both are rationally applicable prospectively, to keep a court from interpreting subsections (1)(A) and (B), which limit such challenges, to affect either legitimate intervenors or certain parties to the order or judgment itself. Petitioner's out of context use of the language shows the depth of negative inference to which she must go to seek (unsuccessfully) a suggestion of retroactivity. And her argument ironically ignores the motive of Section 108, "facilitating prompt and orderly resolution" of proceedings, a goal that retroactive application of the Act most assuredly would frustrate.

laration leaves to the statute a double sense, it is the command of the cases, that which rejects retroactive application must be selected.

Schwab v. Doyle, 258 U.S. 529, 534-35 (1922).

Where the reader seeks a "clear, strong and imperative" and "unequivocal and inflexible" statement of retroactivity, use of negative inference does not suffice:

And so we have one of those problems in the reading of a statute wherein meaning is sought to be derived not from specific language but by fashioning a mosaic of significance out of the innuendos of disjointed bits of a statute. At best this is subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself.

Palmer v. Massachusetts, 308 U.S. 79, 83 (1939). Where, as here, analysis of the asserted interpretation demonstrates other explanations, it is all the clearer that retroactive application is precluded. Where, as here, "other meaning[s] can be annexed" to the words of the statute alleged to create retroactivity, *Heth*, 1 U.S. (3 Cranch) at 413, prospective application is further reinforced. The possibility of an inferred construction does not suffice to satisfy the standard to create retrospective application. A statute "ought never to receive such a [retroactive] construction if it is susceptible of any other." *United States Fidelity & Guaranty Co.*, 209 U.S. at 314.

2. Congress Made A Conscious Choice Demonstrating The Act Does Not Apply To Pending Cases

In selecting the language of Section 402(a), Congress had choices. It was amending Title VII, the history of which provided at least two relevant options.

In amending Title VII in 1972, Congress specifically expressed, in language that is clear, strong, imperative, unequivocal and inflexible, that certain of the amendments applied to cases then pending. Specifically, Section 14 of

those amendments, Public Law No. 92-261, 86 Stat. 103, 113 (1972), stated:

The amendments made by this Act to section 706 of the Civil Rights Act of 1964 shall be applicable with respect to charges *pending with the Commission on the date of enactment of this Act* and all charges filed thereafter.

(Emphasis added.)

In amending Title VII in 1978, Congress took a different course. Section 2(a) of Public Law No. 95-555, 92 Stat. 2076 (1978), provided an effective date as follows:

Except as provided in subsection (b), the amendment made by this Act shall be effective on the date of enactment.

By the time Congress addressed a new civil rights act in 1990 and 1991, the courts had interpreted language of the same sort as Congress used in 1978—and used again in the 1991 Act—to be prospective in operation, *i.e.*, they had found that legislative use of the phrase “shall be effective on the date of enactment” does not create any retroactive application to pending cases. *See, e.g., Condit v. United Air Lines, Inc.*, 631 F.2d 1136, 1139-40 (4th Cir. 1980) (so interpreting the 1978 amendments to Title VII). *See also, Jensen v. Gulf Oil Refining & Marketing Co.*, 623 F.2d 406, 410 (5th Cir. 1980); *Sikora v. American Can Co.*, 622 F.2d 1116, 1123-24 (3rd Cir. 1980). *Cf., Moore v. Califano*, 633 F.2d 727, 732-33 (6th Cir. 1980) (finding that in using “just a general provision”—“The provisions of this Act shall take effect on the date of enactment of this Act . . .”—“Congress thus failed to make any specific provision for retroactive application of the amendments to cases pending on appeal before the courts.”) Congress is presumed to know of prior judicial interpretations of its statutory language when it uses similar language at a later time.

Cannon v. Univ. of Chicago, 441 U.S. 677, 696-99 (1979).

Congress used language to amend Title VII in 1972 which demonstrates it knows how to write statutes which apply to pending cases. Congress used language to amend Title VII in 1978 which demonstrates it knows how to write statutes which do not apply to pending cases, and the courts confirmed that conclusion. *Cf., Touche Ross & Co. v. Redington*, 442 U.S. 560, 571 (1979) (“Obviously, then, when Congress wished to provide a private damage remedy, it knew how to do so and did so expressly.”).

The difference in language was not lost on Congress in its effort to pass a new civil rights act. When it drafted initial versions of what became the Civil Rights Act of 1990, Congress used language modeled after the 1972 amendments. For example, the 1990 version of the act contained provisions expressly addressing pending cases, one of which made the amendment expanding recognized injuries and possible damages under Title VII expressly applicable to pending cases. Section 15(a)(4) of that act provided:

Section . . . 8 [expanding damages under Title VII to include compensatory and punitive damages] . . . shall apply to all proceedings pending on or commenced after the date of enactment of this Act.

S. 2104, 101st Cong., 2d Sess. § 15(a)(4) (1990) (Senate version of the 1990 Civil Rights Act) (emphasis added). The language is clear, unequivocal, and inflexible. It might have been unconstitutional, but it otherwise would have met the standard for retroactive application.

But the language did not survive. The act was vetoed by President Bush. 136 Cong. Rec. S16418-19 (Oct. 22, 1990). That veto put a focus on retroactivity, because one of the President’s reasons for vetoing the legislation was the “unfair” rules it contained about retroactivity. *Id.*

Congress tried again in 1991, using similar language. But before legislation was enacted in 1991, Congress backed off the language that would have applied the amendments to pending cases. Instead, Congress substituted in Section 402(a) the language that made the amendments effective upon enactment, language previously interpreted to be only prospective in operation.

Congress' choice was clear. Its intent is revealed by the path it chose to develop language that would become law. The statute's drafting path moves away from Congress' prior clear language establishing retroactive application to pending cases and toward Congress' prior language interpreted to confirm prospective application. Congress not only is presumed to know the difference between the two choices; the history of the 1991 Act shows Congress did know the difference.

Not only is language requiring retroactivity absent, but it is manifestly *intentionally* absent. Retroactivity language was contained in prior versions of the bill, but it was eliminated as a part of the legislative compromise that led to the enactment of the 1991 amendments.⁷ Petitioners "are now waging in a judicial forum a specific

⁷ Petitioner cannot find comfort in examination of the Administration's proposal (Pet. Brief, p. 19). The language that made its way into the statute as enacted came from Senator Danforth's proposal, which parroted language previously used by Congress in amending Title VII, and interpreted by the courts, to be prospective in its operation. See Roadway's Brief in No. 92-938, pp. 20-23. The Administration's proposal was not the source of the legislation. Even ignoring that fact, the proposal is internally consistent: one sentence of the Administration's proposal is prospective, by prior Congressional usage and judicial interpretation ("This Act and the amendments made by this Act shall take effect upon enactment"); the other is non-retroactive ("The amendments made by this Act shall not apply to any claim arising before the effective date of this Act"). The Administration's proposal thus called once for prospective application and once against retroactive application. That the legislation ultimately enacted only called once for prospective application does not make it retroactive.

policy battle which they ultimately lost" in the Congress. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 864 (1984). Congress could not muster adequate support to apply the amendments to pending cases; it could muster adequate support to make the amendments prospective. That is most compelling evidence of legislative intent. As part of the legislative bargain to achieve new law, the operation of the 1991 Civil Rights Act is prospective.

D. The Act Does Not Apply Retroactively

Congress chose away from language to apply the Act retroactively to pending cases. It chose toward language interpreted to apply the Act only prospectively. Its language provisions support that result. Its legislative history does not negate it.⁸ It is only by attempting, erroneously, to derive meaning by "fashioning a mosaic" out of "the innuendos of disjointed bits of a statute" or snippets of legislative dialogue that even a negative inference of retroactivity can be postulated. That is not the stuff of which the retrospective editing of the regulation of human conduct and the resulting rights, obligations and liabilities should be made.

The principle that retroactive regulation of human conduct is not favored demands not an inconclusive approach to retroactivity but a clear statement of it. When a statute is alleged to apply retrospectively, the search is for "the unequivocal and inflexible import of

⁸ As noted in detail in Roadway's Brief in No. 92-938, pp. 22-23, the history of legislative debate supports prospective application and does not compel retroactive application. At worst, the legislative history reflects a draw in the last minute war of words. Even Petitioner, focusing on the statements of individual legislators, concludes that the comments of legislators are inconclusive. (Petitioner's Brief, p. 14 and n.12) The key is this: neither legislative debate nor various midnight maneuverings by individual legislators restored the language Congress previously had used, and earlier had tried but failed to use here, to apply a statute amending Title VII retroactively to pending cases.

the terms, and the manifest intention of the legislature." *Union Pacific R.R.*, 231 U.S. at 199. The terms of the 1991 Act and their history do not provide an "unequivocal and inflexible import" for retroactivity; an (at worst) inconclusive legislative dialogue does not evidence the necessary "manifest intention of the legislature." *Id.* Lacking these, retroactivity—not favored by the law—should not result.

II. A PRESUMPTION OF RETROACTIVE APPLICATION OF THE ACT TO PENDING CASES IS UNWARRANTED AND UNSOUND

Petitioner relies upon *Bradley*, 416 U.S. at 711-12 (1974) ("a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary") to argue for a presumption that Section 102 should be applied retroactively because it came on the books while her case was pending. *See also, Thorpe*, 393 U.S. at 281-82 (1969). Before addressing this case assuming *Bradley/Thorpe arguendo*, Respondents respectfully submit that history has shown that current efforts to apply *Bradley/Thorpe* have created too much confusion and disarray in the law. Their twig cannot be grafted onto *Bowen's* tree. The Court should use this opportunity to stop their misdirected growth.

Bradley and its progenitor *Thorpe* are unto themselves. Before, and since, the Court has articulated the principle that retroactivity is not favored and has sought "language [that] requires this [retroactive] result." *Bowen*, at 208. *See also, United States v. Security Indus. Bank*, 459 U.S. 70, 79 (1982) ("statutes operate only prospectively").

The Court already has attempted to limit the scope of *Bradley* and *Thorpe*. In *Bennett v. New Jersey*, 470 U.S. 632 (1985), which issued after both *Bradley* and *Thorpe*, the Court noted that *Bradley's* self-limitation "comports with another venerable rule of statutory interpretation,

i.e., that statutes affecting substantive rights and liabilities are presumed to have only prospective effect." *Id.*, at 639-40.

Yet the experience of the lower courts in trying to deal with the ambiguities of discretion created by a seeming choice between the recent *Bradley/Thorpe* approach (which Petitioner interprets to mean statutes are presumed retroactive) and the long-standing principle just reaffirmed in *Bowen* (which confirms statutes are presumed prospective) demonstrates the need for a clear restatement of the rule. Petitioner's own catalogue (Petition in 92-757, pp. E-1 to E-27, listing more than 250 cases on the 1991 Act) reflects the vast amount of judicial time and energy spent on the issue in the context of this one statute alone. What could and should be simple and clear as a default rule, permitting the lower courts to move on to the merits of justice, is instead a cauldron of confusion that has suspended and delayed the advance of the law.⁹

A critical element of the confusion is demonstrated by Petitioners' use of *Bradley* as a jumping off point in these consolidated cases. The use is expansive—it effectively would reverse the principle that the law disfavors retroactivity. If *Bradley* means what Petitioner contends—that the phrase "apply the law in effect at the time it renders its decision" means a new statute presumptively

⁹ What may have been obvious to law students—"[t]he principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student," *United States v. Security Indus. Bank*, 459 at 79 (1982)—is no longer so to lawyers. *Cf., for example*, 90 4th Fed. Digest at p. 188 (1992):

E.D. Ark. 1991. There is a strong presumption against retroactivity of statutes. *Wiener v. Farm Credit Bank of St. Louis*, 759 F. Supp. 510 [*aff'd*, 975 F.2d 1350 (8th Cir. 1992)].

N.D. Cal. 1992. Presumption exists in favor of retroactive application of statutes, . . . *Stender v. Lucky Stores, Inc.*, 780 F. Supp. 1302.

applies to human conduct and trials that preceded it—then the presumption against retroactivity of laws regulating human conduct becomes a presumption in favor of retroactivity, and *Bowen* and 200 years of principle are cut down to die.

Justice Scalia has noted the many reasons for the Court to reaffirm the “clear rule” that “absent specific indication to the contrary, the operation of nonpenal legislation is prospective only.” *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 841 (1990) (Scalia, J., concurring). After reciting examples demonstrating that the presumption against retroactive application of statutes is both ancient and sacred in the law, and explaining the derivation of the *Thorpe* and *Bradley* results, Justice Scalia gets to the heart of the matter:

It is significant that not a single one of the earlier cases cited in *Thorpe* and *Bradley*—except, of course, the cases dealing with judicial decisions rather than statutes and the case dealing with repeal of a criminal statute—even purports to be applying a presumption of retroactivity. They purport to be following the express command of the statute, or not to be acting retroactively at all.

Id., at 850. This recognition, buttressed by lengthy exposition and recitation of the cases themselves, *id.*, at 848-53, isolates the problem with *Thorpe* and *Bradley*: their verbiage unintentionally created fallow ground, and counsel for litigants subsequently have planted the seed of expansive misreading of their scope and effect, by using the wrong “point of departure” in the analysis of prospective or retroactive application. *Id.*, at 858. *Bradley* and *Thorpe* did not expressly address or reverse the historical presumption against retroactive application of statutes regulating human conduct. But they have been interpreted as doing just that.

Justice Scalia’s words in 1990 were prescient in one aspect, to be sure:

The *Thorpe-Bradley* presumption of retroactivity, which is arguably formulated to apply to a relatively narrow class of cases but which logically must be extended across-the-board, misleads prospective litigants and confuses judges of the lower courts.

Id. The hundreds of cases cited in the Petition For Certiorari here are vivid testimony to that misleading and confusing effect. And what has happened here can, and likely will, be repeated for other statutes enacted by Congress in other contexts. Once the seeds are on the wind, they will land and grow.

There are other reasons for pulling the weed that is growing from *Bradley-Thorpe*. The first is that it is impractical in the realm of regulation of human conduct. A presumption of retroactivity is a presumption that human actions may be given consequences that did not exist, and thus were not known, when the actions occurred. This not only would reverse the principle of non-retroactivity; it would strike both the heart of the universal purpose of the law, to guide conduct, and the notions of fairness and justice on which such guidance is based. If laws are to “be made and published only to the intent that by them every man should be put in remembrance of his duty,” Sir Thomas More, *Utopia*, bk. 2 105 (E.P. Dutton & Co., Inc.) (1955) (1516), then “[l]aw as a guide to conduct is reduced to the level of mere futility if it is unknown and unknowable.” Benjamin N. Cardozo, *The Growth of the Law* (Yale University Press) (1924), p. 3. Because they change the consequences of actions taken before their existence to guide conduct, “retrospective laws are . . . generally unjust; and . . . neither accord with sound legislation nor with the fundamental principles of the social compact.” Story, J., *Commentaries On The Constitution* § 1398 (1873). Yet Petitioner’s use of *Bradley-Thorpe* would make all such laws presumptively retroactive to regulate human conduct.

The second reason for discarding further judicial use of a presumption of retroactivity is that it forces the courts into the realm of policy. *Bradley* itself recognizes the need for escape from presumption and invokes the concept of "manifest injustice." The presumption of retroactivity has that effect, to be sure. (See *infra*, pp. 31-35). The concept may be soothing in theory, but it is wrenching in practice. It pulls the courts onto very soft ground, where the result of their thinking can and does "expand or contract the effect of legislative action" across time. *Bonjorno*, 494 U.S. at 857 (Scalia, J., concurring). If "manifest injustice" is not ascertained by the court, human conduct long since past and tried may be revived and new consequences attached to it; if "manifest injustice" is ascertained, the human conduct and its trial may remain in repose. And what determines "manifest injustice"? This is adequately unclear. As Justice Scalia explains, "[a] rule of law, designed to give statutes the effect Congress intended, has thus been transformed to a rule of discretion," *Id.* By what that discretion would be fettered, if at all, is unstated and unknown. Individual courts, motivated by "mercy, or compassion, or social utility, or whatever other policy motivation might make one favor a particular result," must attempt to "judge action on the basis of a legal rule that was not even in effect when the action was taken." *Id.* Legislation by Congress ("should we make this conduct subject to that rule, or not?") becomes legislation by the court ("should I make this conduct subject to that rule, or not?"). The temptations lead away from predictable justice.

Third, Congress itself needs some restraint. Its power to create law is "awesome." *Luddington v. Indiana Bell Tel. Co.*, 966 F.2d 225, 228 (7th Cir. 1992), *petition for cert. filed* (Dec. 3, 1992). Its ability to create substantive rights and obligations is an exercise of the public will, without any concern for "incremental change." *Id.*

Congress needs no justification to depart from current statutes that serve to guide conduct, and it has no "tradition of modesty." *Id.* Beyond the Constitution, Congress' power to affect the lives and fortunes of the citizens of the country and the companies that provide them work knows few restraints. One can overexercise power. Congress is not harmed, and faith in its processes and prescriptions is aided, if "this power is held a little in check by the presumption that its handiwork is to be applied only to future conduct." *Id.*

Fourth, the use of a presumption of retroactivity inflicts a terrible price upon judicial administration. It is effectively a one-two punch. Congress can be, and often has been, silent as to retroactivity when enacting a statute regulating human conduct. Under the "presumption" of retroactivity asserted under *Bradley/Thorpe*, courts must—in virtually every case brought under such a statute—ascertain whether that silence works a manifest injustice. The burden is worsened if, as is logical, manifest injustice is separately determined in the context of each individual case brought under the statute. As each of these separate decisions is rendered (the results may be inconsistent), the burden passes to courts of appeal, who must attempt to reconcile them or distinguish them on the facts of individual cases. The matrix of permutations and combinations of results—under each statute, and then under them all collectively—would pound on the minds of jurists, pushing them away from the merits of justice and into the discretionary interstices of a whole new jurisprudence of "manifest injustice." And then, while the federal judiciary staggers under this new burden, the second body blow comes: for those cases where "manifest injustice" is not found, the courts would have to reach back to rewrite the obligations and consequences, the rights and liabilities, which would (unknowingly, because retroactively) guide the human conduct of the parties to cases and adjust their results, retrospectively. See, e.g., *Luddington*, 966 F.2d at 299 ("Retroactive application

across the board would produce massive dislocations in ongoing litigation . . . [and] engender enormous satellite litigation and associated uncertainty to fix an indistinct boundary"). The impracticality of such an approach is obvious.

The manner of containing the problem is not difficult. It requires only a confirmation that, when a court applies a law in effect at the time of its decision, it must still apply the sacred principle of statutes regulating human conduct—they are not to be applied retrospectively unless Congress manifests such an intention clearly and unequivocally. A court's first recognition may be to ascertain what laws are in effect when it reaches its decision, but its second recognition must be not to apply a law to human conduct which has preceded the effective date of the statute, unless Congress clearly has so provided.

Litigants' misuse and judges' confusion over *Bradley* and *Thorpe* in the context of human conduct have created an aberrant growth that should be cut clean while it is still young. The clear rule reaffirmed in *Bowen* should stand.

III. EVEN UNDER *BRADLEY* RETROACTIVE APPLICATION CANNOT STAND

Even assuming *arguendo* that *Bradley* is used as a point of departure, Petitioner's reliance on it here is misplaced.

A. There Is Statutory History To The Contrary

As noted, *supra* at pp. 13-17, when Congress' drafting path and choices, and the resulting language of the effective provisions of the statute, as interpreted by the courts, properly are considered, they lead to a conclusion of prospective operation. That same analysis rejects the *Bradley* presumption. There is statutory history to the contrary. *Bradley*, 416 U.S. at 711-12.

B. The Act Creates A New Substantive Liability

Under *Bennett*, 470 U.S. at 639-40, "statutes affecting substantive rights and liabilities are presumed to have only prospective effect." See also *United States v. Security Indus. Bank*, 459 U.S. at 79 (1982); *Greene v. United States*, 376 U.S. 149, 160 (1964). In *Bennett*, 470 U.S. at 640, the Court recognized that *Bradley* itself noted that its statutory change "did not affect substantive obligations." Section 102 clearly affects Petitioner's substantive rights and Respondents' substantive obligations and liabilities.

1. The Act Increases Respondents' Substantive Liabilities

There can be no doubt that the addition of compensatory and punitive damages affected—expanded by up to \$300,000 per claim—employers' "substantive liabilities" under Title VII. That such an increase in potential liability derived from a statute whose clear purpose is to regulate human conduct impacts that conduct. As such, it affects both substantive liabilities and substantive obligations.¹⁰ The impact on liabilities is obvious: The potential damage claim has increased from actual lost wages and other restitutionary relief to that relief plus (for large employers) up to an additional \$300,000.¹¹

¹⁰ As noted below, the increase in the degree of financial liability is driven by a recognition of new tort-like personal injuries and legal damages to compensate for them. But even were the \$300,000 increase solely one of degree, it would still create and impose new liability. As Justice Holmes explained:

I have heard it suggested that the difference is one of degree. I am the last man in the world to quarrel with a distinction simply because it is one of degree. Most distinctions, in my opinion, are of that sort, and are none the worse for it.

Haddock v. Haddock, 201 U.S. 562, 631 (1906) (Holmes, J., dissenting).

¹¹ Petitioner's disingenuous approach aids and abets her faulty logic. She does not address a simple question: if one person seeks

2. Prospective Application Is Essential To Permit Employers To Adjust Their Internal Regulation Of Human Conduct

As the court of appeals noted below:

the amended damage provisions of the Act are a seachange in employer liability for Title VII violations.

. . . There is a practical point at which a dramatic change in the remedial consequences of a rule works change in the normative reach of the rule itself.

Landgraf, 968 F.2d at 433. See also, *Luddington v. Indiana Bell Tel. Co.*, 966 F.2d 225, 229:

[Changes in remedies] can have as profound an impact on behavior outside the courtroom as avowedly substantive changes. . . . The new statute . . . subjects employers to greater liabilities.

. . . The amount of care that individuals and firms take to avoid subjecting themselves to liability whether civil or criminal is a function of the severity of the sanction, and when the severity is increased they are entitled to an opportunity to readjust their level of care in light of the new environment created by the change. That is the philosophy behind the ex post facto clause and also behind the interpretive

to obtain money from another person, how can that not be substantive? Petitioner wants to hide under labels. She wants to leverage the labels with inferences from the legislative perspective. What she does not want to do, because it would bring the effect of her claim out into the open, is look at what will happen if she prevails here. What will happen is she will have a new claim for money today, based on an injury first recognized under Title VII in 1991 ("mental anguish"), that she did not have when she was employed, when she quit, when she filed her charge and her lawsuit, when she tried her lawsuit and lost it, or when she appealed it. That new claim for money is substantive. However Petitioner would label it, the Act, if applied retroactively, would have an effect on her substantive rights (they might be worth more) and on Respondents' substantive liabilities (they might increase).

principle that presumes that a new civil statute applies only to conduct that occurs after its effective date.

This is especially true where the human conduct being regulated occurs at many levels of the respondent employer's operation. The case here is illustrative. The human conduct that the court below found caused Petitioner some "mental anguish" was "sexual harassment," "the source of which was a fellow employee named John Williams." (Jt.App. 9, ¶ 1, 10, ¶ 10) The employer did not commit the harassment; Petitioner's fellow employee did. Neither was a supervisor. The theory of substantive liability for the harassment that Petitioner espouses against Respondents is thus derivative and based on respondeat superior.

Such a claim of vicarious liability makes all the more important that employers have the opportunity to train and counsel their supervision and plant management in how to respond. That effort, and the resources committed to it, is affected by the source and degree of liability involved. *Landgraf*, 968 F.2d at 433; *Luddington*, 966 F.2d at 229. For Respondents to be subjected retroactively to materially increased exposure for human conduct it did not commit patently increases its substantive liabilities. Cf., *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17-18) (1976) (noting a hesitancy "to approve the retrospective imposition of liability on any theory of deterrence").¹²

¹² Petitioner invokes Holmes' "bad man" (Pet. Br. at 31) to suggest employers will assume a vested right to discriminate and act with impunity absent retroactive application of the Act. The reference is loud but inaccurate and illogical.

First, the facts here disprove the assumption. Three separate reviews, by the EEOC, the district court and the court of appeals, found that the efforts of USI eliminated the hostile working environment. The employer took steps to stop the harassment, without any recognition of tort-like injuries or availability of legal damages, and thus neither the agency nor the courts had any recognized

3. Section 102 Implicates Both New Substantive Rights And New Substantive Liabilities

Petitioner deals with Section 102 as if all it does is increase the price to be paid by an employer for discrimination. That is not so. The provisions of Section 102 do much more. They add a new cause of action, premised upon injuries not even recognized under Title VII as it existed from 1964 until late 1991, for which new remedies are available.

This Court recognized the impact of the provisions of Section 102 in *United States v. Burke*, — U.S. —, 112 S.Ct. 1867 (1992). Writing last term, but addressing Title VII as it existed prior to the amendments made

injury left to remedy under Title VII. If there are "bad men" out there hypothetically, USI was not one.

Second, Petitioner cites Holmes' use of a hypothetical "bad man" without learning the lesson Holmes was trying to teach. He saw the law as a prospective means to guide the conduct of people based not on intrinsic morality but on their ability to predict consequences of different courses of action. For Holmes, the "bad man" proved the need to know what the consequences of human actions would be: "[I]f we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the . . . courts are likely to do in fact. I am much of his mind." Holmes, *The Path Of The Law*, 10 Harvard Law Review 457, 460-61 (1897). Statutes are one means: "It is to make the prophecies easier to be remembered and to be understood . . . that statutes are passed in a general form." *Id.*, at 458. And the purpose of such laws remains to guide conduct, to let people know "under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves." *Id.*, at 457. Deterrence of human conduct by avoidance of risk and liability is Holmes' method of the law, "to advise people in such a way as to keep them out of court." *Id.* He is four-square with the principle against retroactive application of laws regulating human conduct: What has already occurred cannot be deterred, and liability inflicted beyond that forewarned by law when the conduct occurs is not only unjust but inhibits people's acceptance and use of the law as a deterring prophecy. Retroactive recognition of injuries and imposition of liabilities blocks the path of the law as a guide to human conduct.

by the Civil Rights Act of 1991, the Court recognized that before 1991 Title VII "does not allow for compensatory or punitive damages; instead, it limits available remedies to backpay, injunctions, and other equitable relief." *Id.*, at 1873.¹³ Therefore, "the circumscribed remedies available under Title VII stand in marked contrast not only to those available under traditional tort law, but under other federal antidiscrimination statutes, as well." *Id.* And the source of the limited focus was Congress itself:

Notwithstanding a common-law tradition of broad tort damages and the existence of other federal anti-discrimination statutes offering similarly broad remedies, Congress declined to recompense Title VII plaintiffs for anything beyond the wages properly due them. . . . Thus, we cannot say that a statute such as Title VII, whose sole remedial focus is the award of backwages, redresses a tort-like personal injury. . . .

Id. at 1874. The substantive rights for plaintiffs under Title VII before the enactment of the Civil Rights Act of 1991 did not include the right to damages for tort-like personal injuries; Title VII neither recognized nor remedied tort-like personal injuries.¹⁴ And the substantive lia-

¹³ Here, such relief was not necessary below because, as the EEOC, district court and court of appeals all recognized, USI had undertaken the relief itself. Jt. App. 5 (EEOC) ("since [USI] undertook prompt remedial action, the Commission, accordingly, deems that no additional relief is necessary"); Jt. App. 11 (district court) ("USI had taken steps . . . to eliminate the hostile working environment arising from the sexual harassment"); Jt. App. 26 (court of appeals) (Landgraf challenged, but did not prevail on, "the propriety of USI's reaction to the harassment").

¹⁴ Title VII as it existed until November 1991 says nothing of personal injuries. It was not until the 1991 Act that Title VII's coverage extended to the injuries described in Section 102(b)(3): "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses."

bilities for defendants under Title VII before the enactment of the Civil Rights Act of 1991 did not include the obligation to pay damages for such injuries. Title VII as it then existed provided no such cause of action.

The Court, writing after the enactment of the 1991 amendments from the Act, made clear that these substantive matters changed with the 1991 Act but that the Court was not prepared to transport them retroactively back to the consequences of human actions at times before the 1991 Act:

Under the Civil Rights Act of 1991, victims of intentional discrimination are entitled to a jury trial, at which they may recover compensatory damages for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses," as well as punitive damages. See Pub. L. 102-66, 105 Stat. 1073. . . . [W]e believe that *Congress' decision to permit jury trials and compensatory and punitive damages under the amended act signals a marked change in its conception of the injury redressable by Title VII, and cannot be imported back into analysis of the statute as it existed at the time of this lawsuit.*

Id., at 1874, n.12 (emphasis added).

If a substantively retroactive law is one that creates "a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed," *Union Pacific R.R.*, 231 U.S. at 199, or one that "changes the legal consequences of acts completed before its effective date," *Miller v. Florida*, 482 U.S. 423, 431 (1987), quoting *Weaver v. Graham*, 450 U.S. 24, 31 (1981), then the compensatory and punitive damage provisions of Section 102 certainly are substantive in how they would affect Respondents retroactively. Its provisions are a "marked change" and they "cannot be imported back into analysis of the statute as it existed at the time of this lawsuit." *Burke*, 112 S.Ct., at 1874,

n.12. Even assuming *Bradley*, no presumption of retroactive application of Section 102 applies, because Section 102 "affect[s] substantive rights and liabilities [and thus is] presumed to have only prospective effect." *Bennett*, 470 U.S. at 639-40; *Security Indus. Bank*, 459 U.S. at 79; *Greene v. United States*, 376 U.S. at 160.

C. The New Jury Trial Procedure Follows The New Substantive Liability

Before the Civil Rights Act of 1991, Title VII cases were tried to the court. 42 U.S.C. § 2000e-5(f)(4). Section 102(c) changes that, by providing:

If a complaining party seeks compensatory or punitive damages under this section [102, which did not exist until 1991]—

(1) any party may demand a trial by jury; and

(2) the court shall not inform the jury of the limitations described in subsection (b)(3).

This language makes clear that the new right to a jury trial is dependent upon the availability of the new compensatory or punitive damages. The jury trial of Section 102(c) is thus linked to the substantive liability of Section 102(a). Because the substantive liability precludes retroactive application, the jury trial, having no independent purpose, is precluded as well.

D. Retroactive Application Of The New Substantive Rights And Liabilities And Jury Trial Provisions Would Be Manifestly Unjust

Ignoring *arguendo* the aberrational injection of *Bradley* and *Thorpe* into the realm of regulation of human conduct; ignoring *arguendo* the substantive rights and liabilities expanded and thus affected by Section 102; and assuming *arguendo* the retroactive application of Section 102's punitive and compensatory damage provisions, via jury trial, to Respondents here, such an application is "manifestly unjust." There are many reasons.

To begin, for a defendant to receive and respond to allegations, to defend them at trial, to be put to an appeal, to have it be fully briefed, and then to have the whole process be derailed and recycled by a communication from Petitioner's counsel to the court, ultimately seeking ex post facto a new proceeding with expanded liability from a new trier of fact, unfairly upsets the justice already dispensed. In layman's terms, it wasn't over when it should have been. The ad hoc growth of a new proceeding would produce a windfall for the Petitioner. Justice is not well-dispensed from a merry-go-round. See *Landgraf*, 968 F.2d at 432-33, rejecting the notion of a remand for a jury trial:

We are not persuaded that Congress intended to upset cases which were properly tried under the law at the time of trial. [citing *Bennett*] To require USI to retry this case because of a statutory change enacted after the trial was completed would be an injustice and a waste of judicial resources.

Second, the proceeding would have to examine all over again the facts of Petitioner's claim, which would be a clear waste of precious judicial time and energy, or would have to bind Respondents to the litigation tactics and judgments they made in a proceeding in which matters such as punitive damages and compensatory damages were not at issue and in which the trier of fact was an experienced Federal judge, not a jury. There are many aspects of any judicial proceeding—from the understanding of the law at the time to the strategic judgments of offers of evidence to the nuances of stipulations—that may change dramatically if the plaintiff's state of mind is a source of potential injury and damages; if the trier can add punishment to remedy; if the trier of fact is jury, not judge; and so on. The injustice—a version of “bait and switch”—is manifest.

Third, the result would be freakish and arbitrary. Employers whose employees engaged in conduct in the mid-

1980s similar to that involved here would be left free in history, without retroactive application of Section 102 to that conduct, while Respondents here would be retroactively bound to respond to Section 102 as if it had been in effect when such human conduct occurred. The selective rewriting of history that would be occasioned by a retroactive application of Section 102 would not impact employees and employers evenly, nor with a just hand. Some would have the rights and liabilities established by their proceedings touched not a whit; others, like Respondents here, would watch the records in their proceedings no longer be worth the paper they are printed on. An extra-record letter from counsel to the court at the tail end of an appeal is an odd, unusual and unjust means to distinguish among employers and employees to see which suddenly have new rights and liabilities and which do not.

Fourth, Congress made no distinction between punitive and compensatory damages in Section 102. The \$300,000 cap applies collectively. The notion that an employer may be punished—subjected to punitive damages—in an ex post facto proceeding, based on human conduct that occurred before the possible punishment was even known, would be unjust beyond quarrel. See, e.g., *Luddington*, 966 F.2d 225, 227-28 (1992):

The idea that the law should confine its prohibitions and regulations to future conduct, so that the persons subject to the law can conform their conduct to it and thus avoid being punished, whether criminally or civilly, for conduct that they had no reason to think unlawful, is a component of the traditional conception of the “rule of law.” . . . [C]onformity to it is the right policy for courts to follow in default of other guidance.

Cf., *Weaver v. Graham*, 450 U.S. 24, 28 (1981) (“[t]he enhancement of a . . . penalty . . . seems to come within the same mischief as the creation of a . . . penalty after

the fact' ") (quoting *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 397 (1798) (Paterson, J.)).

Fifth, the employers involved would have had no opportunity to measure the risk of their conduct. A potential \$300,000 swing in exposure will have a deterrent effect. Indeed, that is precisely what Congress recognized. See Section 2(1) of the Act: "additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace." There is an obvious discrepancy between a statutory purpose to deter conduct and a retroactive application of a substantive liability provision to human conduct that occurred six years ago. Cf., *Usery v. Turner Elk-horn Mining Co.*, 428 U.S. at 17-18 (expressing the Court's hesitancy "to approve the retrospective imposition of liability on any theory of deterrence"). It is impossible to deter conduct that has already occurred.

The corollary of deterrence is an opportunity to avoid the penalty imposed for the violation. For employers such as Respondents here to be subjected to the penalty without the opportunity to avoid it would be manifestly unjust. See, e.g., *Landgraf*, 968 F.2d at 433:

It would be an injustice . . . to charge individual employers with anticipating this change in damages available under Title VII. . . . [C]ompensatory and punitive damages impose 'an additional or unforeseen obligation' contrary to the well-settled law before the amendments. [quoting *Bradley*, 416 U.S. at 721].

See also *Luddington*, 966 F.2d at 229 ("such changes [in damages] can have as profound an impact on behavior outside the courtroom as avowedly substantive changes").

Finally, the discretion provided to courts to implement the concept of "manifest injustice" in the context of substantive rights and liabilities itself would be unjust. The context is a loophole, a sea of discretion. The substantive rights and liabilities created by Title VII alone cover

virtually the full spectrum of employment decisions, with plaintiffs of both sexes and every race, religion, national origin and other protected criteria. At any given point in time, their proceedings are at stages across the entire gamut from charge to appeal. The resulting matrix of possibilities against which to create new claims and proceedings is virtually infinite. And there would be nothing save the words "manifest injustice" to guide the courts. The resulting proliferation of rulings, all subject to appeal, can hardly be expected to have that degree of uniformity and predictability which tells the litigants involved they have been treated fairly.

What Petitioner seeks here is a rule that would rewrite the substantive effects of history, by allowing a plaintiff retroactively to create and expand substantive legal relief, and thus retroactively to impose on a defendant new and expanded substantive legal liability, unknown to the defendant in the exercise of its obligations and unavailable to the plaintiff in the pursuit of her rights at the time when the relevant human actions occurred, using a proceeding not even created until long after the conduct giving rise to the dispute occurred and well after the dispute had been tried. That is manifestly unjust.¹⁵

¹⁵ In an era where the rights of the individual are expanding by increased Congressional regulation of "human action," there will always be individuals whose "human actions" fall on the "before" rather than the "after" side of the line when Congress creates a new substantive right and imposes a new substantive liability. It is a natural instinct for such individuals to act in their own self-interest, seek to remake history, and drag the benefits of the future into the past. Lawyers may enjoy this exercise, but few others will. The courts risk loss of precious time and energy. The Congress risks judicial discretion that undercuts or overrides legislative intent. The humans whose actions are regulated will lose the ability to look to positive law as a guide to their conduct, for fear next year's enactments will be applied backwards in time and shake their reliance upon the law like leaves from a tree in the wind. The result is that in the name of equality the quality of law, justice and life risks being degraded for all.

IV. PROSPECTIVE APPLICATION WILL PARALLEL THE PROGRESSIVE PATH OF THE LAW

It is quite evident that there is no basis to find retroactive application of Section 102 to pending cases involving human conduct and trials that occurred prior to the enactment of the 1991 Act. What Congress did, and how Congress did it, simply defeats any claim of retrospective operation of the Act. And why Congress did what it did does not compel retroactive operation either. To the contrary, the purposes of the 1991 Congress enacting its Civil Rights Act through the compromises it reached comport entirely with a prospective operation of the statute.

Congress' findings that gave rise to the Act asserted the need for both deterrence and additional protections against discrimination. *See* Section 2(1) ("additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace") and 2(3) ("legislation is necessary to provide additional protections against unlawful discrimination in employment"). These are entirely consistent with prospective application. The new regulations of human conduct, injuries and remedies created by the Act will serve to provide "additional protections" against discrimination in the future and "additional remedies" when it does occur; and they will serve to "deter" the conduct and its results made actionable by the Act. As this Court has noted, Congress' supporting reports recognized the need to acknowledge new injuries and provide new compensatory and punitive damages for them via Section 102. *Burke*, 112 S.Ct. at 1874, n.12. Congress' purposes will be served with prospective application of Section 102.

In the regulation of human conduct, at the federal level, it is the actions of Congress that move the law forward. In 1991, a new Congress determined to expand recognized injuries under Title VII (to include those

"tort-like" injuries identified in Section 102(b)(3)) and to create new liabilities under Title VII (to include compensatory and punitive damages) to recompense individuals who suffer such injuries and file claims based on them. What the 1991 Congress did to create these expanded rights and liabilities based on the human conduct regulated by Title VII in 1991 should be applied, prospectively.

The presumption against retroactivity of laws regulating human conduct has its basis in fundamental notions of substantial justice and fair play. Its application in the American system of government both reflects and reinforces basic attributes of our democratic institutions. The legislative process is not static; rather, it is a dynamic process in which shifting coalitions of interest groups forge coalitions, make compromises, and ultimately forge, through the legislative struggle, an act of Congress. This process repeats itself each session of Congress—there is not but one Congress, rather a series of Congresses, each of which is entitled to respect as the legislative representatives of the people at any given point in time.

The law that was in effect at the time that the facts of this lawsuit occurred, at the time that this lawsuit was instituted, and at the time that this lawsuit was tried, represented a compromise of conflicting interests by a Congress that intended such human conduct to be governed by a law that it had passed. That Congress, under basic principles of American public law, could not bind future Congresses and prohibit them from ever altering that law, and the balance of interests that it represented. But just as an earlier Congress cannot bind a future Congress, a future Congress should not be presumed to undo the work of earlier Congresses absent explicit statutory language, particularly in the realm of regulation of human conduct.

Explicit statutory language exists regarding the law applicable to this case—the conduct occurred after the

effective date of the Civil Rights Act of 1964, as amended in 1972 and 1978, and those Congresses intended that this conduct be governed by the substantive rules and liabilities that had been enacted. Under those substantive rules, USI was found by the EEOC, the district court and the court of appeals to have responded properly and in a manner that alleviated the harassment being caused by Petitioner's fellow employee, so that neither injunctive nor declaratory relief was warranted. Under those substantive rules, there was no recognition under Title VII of Petitioner's mental anguish caused by her fellow employee as an injury, nor any provision of legal damages under Title VII to compensate her for it. Absent explicit statutory language erasing the positive law created by the earlier Congresses, there is no basis for applying a different rule of law to this case. To do so would be a usurpation of the legislative authority possessed by the Eighty-Eighth Congress that enacted the Civil Rights Act of 1964, and the Ninety-Second and Ninety-Fifth Congresses that amended it in 1972 and 1978.

Under the Petitioner's view of the law, there would be no finality to litigation. The dynamic legislative process, which in some respect or another is constantly changing, would necessitate reconsideration of a myriad of decisions in lawsuits at all stages of development, simply because Congress has not spoken clearly to the question of retroactivity. This position would destroy the wisdom handed down over the generations by the illustrious members of this Court—that the principle of non-retroactivity of laws regulating human conduct has been held sacred in the United States, and that clear language from Congress is required before a court will adopt the “odious construction” of making a statute retroactive.¹⁶

¹⁶ There is a visionary purpose to the Court's historical principle that “retroactivity is not favored in the law”—to keep the creation of law at a time separate from and prior to the application of it, so that the “policy preferences” of the legislature may not be cre-

The retroactive application of the 1991 amendments to this case would erase the legislative compromise that earlier Congresses deemed appropriate to govern the human conduct that occurred in this case. That position flies in the face of centuries of jurisprudence, sound principles of American government, the realities of the legislative process, and fundamental notions of substantial justice and fair play.

The progressive path of the law is served societally with a prospective application of the statute. The new injuries are now recognized, and the new damages on which they are based are now available under all statutes addressed by Section 102. Employers are now on notice of the increased liabilities that may accrue, and those increased liabilities serve to motivate increased employer vigilance against harassment and intentional discrimination, creating the deterrent effect Congress desires. Should human actions nevertheless be imperfect, the new injuries Congress recognized and the new damages Congress provided for them in the 1991 Act are now available. Congress' purposes are served.

ated at the same time (or even after) the courts reward or punish the conduct to which the preferences are applied. A presumption that Congress at least will let citizens know—in “clear, strong and imperative” language of “unequivocal and flexible import”—when it would rewrite the effects of history that cannot be recovered from the past helps them have faith in Congress and the courts as a guide to their conduct in the future. It is fundamental to the rule of law.

CONCLUSION

The judgment of the Court of Appeals holding that the Civil Rights Act of 1991 did not retroactively apply to this case should be affirmed.

Respectfully submitted,

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No. 92-757

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October Term 1992

BARBARA LANDGRAF,

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**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF
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Reply Brief for Petitioner

ARGUMENT

**I. THE PLAIN LANGUAGE OF THE ACT DIRECTS
THAT THE ACT APPLIES TO PENDING CASES.**

It is common ground that the starting point to answer the question before the Court—whether the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (the “Act”), applies to pending cases—is the language of the Act itself. *See, e.g., Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990). We differ, however, on two points: First, whether the language of a statute must expressly and unequivocally state that it is applicable to pending cases before the courts may so apply it, and second, as to how the “plain language” of the Act should be read in this case.

A. The Court Should Reject Respondents' Proposed "Clear Statement" Rule.

Respondents urge that the Act cannot be read to apply to pending cases because the words of the statute are not sufficiently "clear, strong and imperative" (USI Film Products *et al.* Brief for Respondents ("USI Br.") at 5) to permit it to be applied in pending cases. According to respondents, unless Congress uses "words that are . . . of unequivocal and inflexible import, manifestly evidencing a Congressional intent" in favor of application of a new statute to pre-Act conduct, the statute does not apply to pending cases. (USI Br. at 5)

Precedent does not support respondents' argument. In fact, not only would respondents' proposal bring about a new and dangerous principle of statutory construction, it would also require overruling *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827 (1990). Under *Bonjorno*, "the most logical reading" of the statute governs. There, the Court concluded that the statute at issue did apply to certain preexisting claims, notwithstanding that it did not do so clearly and unequivocally. The proposal is also inconsistent with *Bradley v. School Board of Richmond*, 416 U.S. 696 (1974), and *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988).¹ We submit that the Court's traditional rule of statutory construction is the correct one and should be followed here.

B. Sections 109(c) and 402(b) Are the Exceptions to Which Section 402(a) Refers.

We contend that in order to give meaning to sections 109(c) and 402(b), which are admittedly prospective, section 402(a) must be read to mean that the Act applies to pending cases; otherwise, sections 109(c) and 402(b) would be mere surplusage. Specifically, we argue that sections 109(c) and 402(b) are the

¹ To be sure, there may be circumstances, such as Eleventh Amendment abrogations, that require that Congress legislate with an unusually high level of clarity and precision as to what it intends, but this case does not present such a circumstance.

sections to which the phrase "except as otherwise specifically provided" in section 402(a) refers. (Brief for Petitioner ("Pet. Br.") at 8-10)

Respondents disagree. They argue that the "except as otherwise specifically provided" language in section 402(a) is a reference to section 102(a)(2) of the Act and section 108 of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12112 (1990) (the "ADA"), which, read together, provide that claimants who file suit under the ADA when it became effective on July 26, 1992, eight months after the Act, would be entitled to seek compensatory and punitive damages, and that the exception therefore guarantees that ADA claimants would not be entitled to those remedies until then. (USI Br. at 11) Leaving aside the fact that not a single one of the courts that has struggled with the question sub judice has come up with such a novel interpretation, respondents' reading is wrong for the following reasons:

First, it is illogical to suppose that Congress was referring to some other statute when it was setting the effective date of the Act. Section 402(a), by its terms, must refer to an exception within the Act itself. It makes no sense to search the ADA, or any other statute for that matter, for the exception to which the language in the Act refers. Otherwise, courts conducting a plain language analysis of a statute with language similar to that in section 402(a) would be forced to search any and all statutes relating even remotely to the statute at issue to determine whether there are any exceptions to that statute.

Second, section 102(a)(2) provides an additional remedy for violations of other statutes, and is only triggered when a statute both applies and is violated. Section 402(a) is unnecessary to accomplish the purpose suggested by respondents and their amici. Because the right to damages obviously does not lie if there is no cause of action, Congress simply would not have made the effective date of the ADA the exception to which the qualifying language of section 402(a) refers.²

² Respondent USI attempts to analogize this case to *United States v. Wurts*, 303 U.S. 414 (1938) (USI Br. at 11 n.5), but respondent draws the wrong

C. The Phrase "Take Effect Upon Enactment" Does Not Stand By Itself.

Respondents USI and Roadway Express ("Roadway") argue that courts have construed the language "take effect upon enactment" to be prospective only, and, since Congress is presumed to have known about and adopted prior judicial interpretations of similar language, Congress must have intended the same result by using that language here. (USI Br. at 14-15; Roadway Express, Inc. Brief for Respondents ("Roadway Br.") at 14-16) That argument ignores ours. We argue that that phrase, when read together with its qualifying clause ("except as otherwise specifically provided . . .") and two explicitly prospective sections, makes it clear that the statute on the whole applies to pending cases. It is not necessary for the Court to decide what that phrase means when it stands alone, because it does not stand alone here. In any event, respondents' reading of the cases is wrong.³

analogy. In *Wurts*, the Court held that the statute of limitations in the Revenue Act of 1928 began to run from the date of payment, not the date when the refund was erroneously allowed. The Court reasoned that any other reading would have meant that the statute of limitations would begin to run prior to the accrual of the right. *Wurts*, 303 U.S. at 418. The correct analogy to *Wurts* is that, just as it made no sense for a statute of limitations to run before a right accrued, it likewise makes no sense to assume that section 402(a) was necessary lest a remedy attach before a right, because no rational court could conclude otherwise.

³ See *Yakim v. Califano*, 587 F.2d 149, 150 (3d Cir. 1978) ("no explicit direction on the retroactivity issue" in the Black Lung Benefits Reform Act of 1977 from the phrase "shall take effect on the date of the enactment of this Act"; other language in the act indicated that the act was to apply prospectively to court cases as opposed to administrative hearings); *Leland v. Federal Ins. Adm'r*, 934 F.2d 524, 527 (4th Cir.) (the language in the Upton-Jones amendment to the National Flood Insurance Act—"shall become effective on the date of enactment of this Act"—does not alone "expressly provide for retroactive application"; court applied *Bowen* analysis to find the act applied prospectively), *cert. denied*, 112 S. Ct. 417 (1991); *Jensen v. Gulf Oil Ref. & Mktg. Co.*, 623 F.2d 406, 409 (5th Cir. 1980) ("take effect on the date of enactment" was not dispositive; court applied *Bradley* analysis to find the act applied prospectively); *Sikora v. American Can Co.*, 622 F.2d 1116, 1120 (3d Cir. 1980) (both interpretations of "take effect on the date of enactment" in an amendment to the ADEA were

D. Sections 109(c) and 402(b) Are Not Statutory "Insurance" Provisions.

Respondent Roadway claims that sections 109(c) and 402(b) are statutory insurance policies—in the nature of wearing a belt with suspenders—inserted by Congress to ensure that at least certain sections of the Act would be applied prospectively and therefore the Court should, essentially, ignore them. (Roadway Br. at 18) Citing three Supreme Court cases, Roadway argues that this Court has adopted as a principle of statutory construction the notion that the inclusion of redundant provisions constitutes nothing more than statutory insurance policies. (Roadway Br. at 19 n.5)

None of the cases cited by Roadway, however, stand for this proposition. In *County of Washington v. Gunther*, 452 U.S. 161, 169-70 (1981), this Court found that the Bennett Amendment to Title VII immunizing pay differentials "authorized" by the affirmative defenses in the Equal Pay Act was not redundant of the same affirmative defenses in section 703(h) of Title VII, but was intended to ensure that the affirmative defenses in both statutes were construed *in pari materia*. That consideration has no application here. In *Massachusetts v. Morash*, 490 U.S. 107, 114 n.9 (1989), this Court found that there were differences in the partially overlapping provisions at issue sufficient to foreclose any redundancy argument. That consideration has no application here. Finally, in *Mackey v. Lanier Collection Agency & Service*, 486 U.S. 825, 839 (1988), this Court held that an amendment to ERISA was not duplicative of an original section of ERISA because Congress could have had a different purpose—clarifying its original intent—as to the original provision. Moreover, this

plausible; using *Bradley* analysis, court applied statute prospectively); *Condit v. United Air Lines, Inc.*, 631 F.2d 1136, 1140 (4th Cir. 1980) (the language "shall be effective on the date of enactment" alone did not direct application of the act to pending cases nor did it require prospective application; court relied on other language in the act and the legislative history to find the act applied prospectively); *Schwabenbauer v. Board of Educ.*, 667 F.2d 305, 310 n.7 (2d Cir. 1981) (citing *Condit*).

Court simultaneously stressed the need to avoid constructions that would make a provision truly redundant. The Court stated:

"It is this sort of redundancy—*i.e.*, the suggestion that Congress intentionally adopted, at a single time, two separate provisions having the same meaning—that calls a particular statutory interpretation into question."

Id. at 839 n.14. Thus, far from supporting respondents' "insurance policy" argument, those cases undermine it.⁴

II. RESPONDENTS' RELIANCE ON LEGISLATIVE HISTORY IS MISPLACED, AND IN ANY EVENT THEIR INTERPRETATION IS WRONG.

A. The Plain Language of the Act Controls, Not the Origin of Section 109(c).

Roadway argues that the fact that section 109(c) prohibits application of the Act to certain pending cases does not indicate

⁴ We note, too, that, if section 402(b) is, as respondents claim, an "insurance" policy, there would be no need for that provision to begin with the qualification "[n]otwithstanding any other provision of this Act".

Further, the importance of reading the exceptions as stating a rule different from the general rule of section 402(a) is especially underscored by the use of the term "otherwise", which specifically indicates that exceptions treat the statute's applicability differently, or "otherwise", from the general rule.

Respondent USI argues that sections 109(c) and 402(b) could be redundant for emphasis and that the Act is already redundant because section 110(b) "needlessly restates section 402(a)". (USI Br. at 11-12) Section 110(b) provides that "[t]he amendment made by this section shall take effect on the date of the enactment of this Act"; section 402(a) provides that "[e]xcept as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment". The operation of the phrases when read in context, however, is quite different if the Act does not apply to pending cases. Sections 110(b) and 402(a) will be duplicative whether the Act does or does not apply to pending cases. The same is not true with sections 109(c) and 402(b); sections 109(c) and 402(b) will be redundant only if the Act applies prospectively. Thus, to the extent that any inference can be drawn from the duplicative wording in 110(b) and 402(a), the sole possible inference is that the duplication was a mistake. No such unavoidable inference can be drawn from the language of sections 109(c) and 402(b).

that the remainder of the Act applies to pending cases because this provision was originally inserted in a version of the Act that was "expressly retroactive". (See *Roadway Br.* at 23) It is a firm rule of statutory construction, however, that when the language of a statute is clear, courts look to the statute's plain language, not, as respondents suggest, to the origin of each word and clause of the statute. See *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992).

Moreover, respondents' argument is at odds with the facts. Although the language of section 109(c) originated in a version that explicitly applied to cases pending on the date of enactment, Congress not only chose to retain the section when such "expressly retroactive" language was deleted, but also added section 402(a) with its "except as otherwise specifically provided" language. In addition, Congress added section 402(b), and both houses of Congress debated the propriety of section 402(b) at length, and sometimes acrimoniously, prior to its passage, long after the "expressly retroactive" language was deleted. See 137 Cong. Rec. S15950-68 (daily ed. Nov. 5, 1991); 137 Cong. Rec. H9505-58 (daily ed. Nov. 7, 1991).⁵ In fact, when the section was

⁵ The Equal Employment Advisory Council argues that no inference should be drawn from section 402(b) because Senator Murkowski, its drafter, made a statement to that effect. (EEAC Br. at 14 n.5) Senator Murkowski also wrote and stated several times, however, that he believed the Act would apply to pending cases, thus necessitating section 402(b) in order to exempt the *Wards Cove Packing Company*. In his "Dear Colleague" letter of October 15, 1991, proposing this section, Senator Murkowski stated:

"As presently drafted, Section 22 of S. 1745 [identical to section 402(a)] would apply retroactively to all cases pending on the date of enactment, regardless of the age of the case. My amendment will limit the retroactive application of S. 1745 with regard to disparate impact cases for which a complaint was filed before March 1, 1975 and for which an initial decision was rendered after October 30, 1983. To the best of my knowledge, *Wards Cove Packing Co. v. Atonio* is the only case that falls within this classification."

Letter from Murkowski to Colleagues of Oct. 15, 1991, reprinted in 137 Cong. Rec. S15954 (daily ed. Nov. 5, 1991). Later, during the debate over reinserting section 402(b) when it had been erroneously omitted, Senator Murkowski argued

inadvertently omitted from the Senate version, a second protracted debate ensued before it was reinserted. It cannot be said, therefore, that Congress did not know precisely and exactly what it was doing, or that it followed this course of action while knowing it to be meaningless.⁶

B. President Bush's Veto of the 1990 Civil Rights Act Does Not Negate the Plain Language of the 1991 Act.

Respondents find support for the Act's prospective application in the fact that President Bush vetoed the 1990 Act. Because the President vetoed the 1990 Act in part because of the "unfair retroactivity rules", they argue that the 1991 Act should not be similarly interpreted. (See USI Br. at 15; Roadway Br. at 19) However, such an argument, if there is any relevance to it at all, ignores both the text of the 1990 Act and the reasons for the President's objections to it. President Bush's veto message referred to a memorandum written by Attorney General Thornburgh, which, the President said, more fully explained the reasons for his veto. 26 Weekly Comp. Pres. Doc. 1632 (Oct. 22, 1990). The Thornburgh Memorandum stated that the 1990 Act "unfairly applies the changes in the law made by S. 2104 to cases already decided". Attorney General Thornburgh's Memorandum for the President (Oct. 22, 1990) (Appendix A to petitioner's main brief) (emphasis added). Thus, it was obviously the 1990

that "[r]etroactive application of a new standard of law is unfair and perhaps unconstitutional. . . . It is unfair for Congress to change the rules at this time and apply the case to that that arose in 1971". 137 Cong. Rec. S15953 (daily ed. Nov. 5, 1991).

⁶ Roadway contends that, in determining the meaning of section 402(a), "retroactivity is not the only statutory alternative" to the "unambiguous prospectivity provisions" in sections 402(b) and 109(c). (Roadway Br. at 18) Instead, Roadway suggests a third alternative; that Congress intended section 402(a) to be *ambiguous*, purposely leaving it up to the courts to resolve its effect (by reference to default presumptions which, Roadway asserts, Congress thought were unclear). (Roadway Br. at 18 & n.5) It is wholly contrary to the basic principles of statutory construction, however, to assert that Congress included in a statute a provision that simply has *no* meaning or operative effect.

Act's "super-retroactivity"—its reopening of final judgments, not its application to pending cases—that led the President to characterize it as containing "unfair retroactivity rules".

C. The "Drafting Path" of the Act Does Not Negate the Act's Plain Language.

Respondents argue that the "drafting path" of the Act moved away from explicit retroactivity language, thereby rendering the Act wholly prospective. (USI Br. at 15-17) We note, however, that the "drafting path" only moved away from the application of the Act to final judgments—Congress clearly rejected the explicit prospective language. (See Pet. Br. at 15-20)

What is apparent from the drafting path is that members of Congress could not overcome a veto of the type of super-retroactivity language contained in the vetoed 1990 Act (which would have reopened final judgments) and that the purely prospective language contained in the Administration's proposals drew only negligible support in Congress. Contrary to respondents' argument, the Act's "drafting path" does not support its prospective-only interpretation.

III. APPLICATION OF THE ACT TO THIS CASE DOES NOT IMPLICATE RESPONDENTS' SUBSTANTIVE RIGHTS, NOR DOES IT GIVE RISE TO CONSTITUTIONAL CONCERNS, NOR WOULD IT BE MANIFESTLY UNJUST.

Respondents put forth a number of arguments why, assuming *arguendo* that the analysis in *Bradley v. School Board of Richmond*, 416 U.S. 696 (1974), is still valid, application of the Act to pending cases and to this case in particular would be manifestly unjust. None of those arguments has merit.

A. Application of Section 102 of the Act Would Not Be Manifestly Unjust.

At the heart of respondents' argument, expressed several different ways, is the proposition that the Act should not be applied so as to give petitioner an opportunity for compensatory and punitive damages because to do so would affect respondents'

"substantive rights". Respondents say that the Act "change[s] the consequences of actions taken before [its] existence", that the Act is one "regulating" and "guiding" human conduct, that it increases their "substantive liabilities" and affects their "substantive obligations" and that it adds "a new cause of action, premised upon injuries not even recognized under Title VII". (USI Br. at 21, 25-36) Each of these characterizations, none of which is accurate, is made in order to bring this case within the proposition of law that, whereas statutes affecting remedies and procedures can be given effect in pending cases, statutes affecting vested rights should not be so applied where it would work a manifest injustice to do so.

In order to reply to respondents' argument, we must first reply to their characterizations. The sections of the Act that affect petitioner, those regarding damages and jury trial, do not "regulate human conduct" nor do they create a new cause of action or create "substantive liabilities". They simply increase the remedy for conduct that has been unlawful for almost thirty years and they also require a new decision-making mechanism. There should be no mistake about it—the conduct in which USI Film Products engaged was and has been clearly unlawful since at least 1965 when Title VII went into effect.⁷ Respondents have no "settled right" to disobey the law nor do they have a right to decide whether to obey the law if the cost of compliance would be greater than the cost of violation. See *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1554 (11th Cir.) (no governmental entity has a "vested right" to continue practices validly prohibited by Congress), *cert. denied*, 469 U.S. 976 (1984). The notion, which finds mistaken support in *Luddington v. Indiana Bell Tel. Co.*, 966 F.2d 225 (7th Cir. 1992), *petition*

⁷ Further, intentional sexual discrimination was likewise actionable under general Texas tort law before November 21, 1991. See *Bushell v. Dean*, 781 S.W.2d 652, 657 (Tex. App. 1989) (affirming finding of intentional infliction of emotional distress based on sexual harassment), *rev'd on other grounds*, 803 S.W.2d 711 (Tex. 1991); *Tidelands Auto. Club v. Walters*, 699 S.W.2d 939, 942 (Tex. App. 1985) (setting out elements of tort of intentional infliction of emotional distress).

for cert. filed, 61 U.S.L.W. 3446 (Dec. 3, 1992) (No. 92-977), that citizens should have the right to make an economic cost-benefit analysis before deciding whether to obey a given law is not only destructive of the civil rights laws, but is also ultimately destructive of all law—indeed, it is flatly inconsistent with the concept of ordered liberty. Let us be clear. It may well be the case that citizens do perform such a cost-benefit analysis before deciding whether to obey or break the law. But they do not have a judicially enforceable *right* to opt for disobedience whenever that analysis suggests that it would be economically beneficial to do so—a sort of economic laissez-faire approach to obedience to the law. They have no right whatsoever to break the law, and yet that is where respondents' argument ineluctably leads.

Respondents contend that it would be "unjust" to apply section 102 to them in this case. They argue that they never had an opportunity to "adjust their internal regulation of human conduct" because such an "effort, and the resources committed to it, is affected by the source and degree of liability involved". (USI Br. at 26-27) In other words, if respondents had known that it might cost them up to \$300,000 if they violated the civil rights laws, instead of merely back pay, they might have tried harder to obey them.⁸ Such a result (that is, increasing the remedies for violating the law and changing the decision-making mechanism) is neither unlawful, unjust nor morally unfair.

Respondents further argue that applying section 102 to this case would be manifestly unjust because the court would either have to "examine all over again the facts of Petitioner's claim" or "bind Respondents to the litigation tactics and judgments they made in a proceeding in which matters such as punitive damages and compensatory damages were not at issue and in which the trier of fact was an experienced Federal judge, not a jury". (USI Br. at 32) The argument is not compelling. Petitioner's case will

⁸ There is a factual problem with this argument. Respondents were also subject to state-law liability for intentional infliction of emotional distress, and they clearly had no "settled expectation" at the time they engaged in the offending conduct that the statute of limitations would run with respect to such a claim, which is unfortunately what happened here.

not have to be examined all over again, because "an issue once determined by a competent court is conclusive". *Arizona v. California*, 460 U.S. 605, 619 (1983). Here, there was a finding by a competent court that Ms. Landgraf was sexually harassed, that the harassment was sufficiently severe to support a hostile environment claim, and that USI failed to take prompt remedial action to alleviate the harassment. (See Pet. Br. at 4; see also Joint Appendix at 11) These findings will be binding on the jury on remand, obviating any need for a reexamination of the facts underlying petitioner's claim.

Respondents' alternative contention, that it would be unfair to bind them to the litigation choices they made when presenting their defense to a judge, and not a jury, is similarly flawed. (USI Br. at 32) This contention is foreclosed by this Court's decision in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). Under the law of the case, applicable here, as under the doctrine of collateral estoppel applicable in *Parklane Hosiery*, the only relevant inquiry, in addition to whether the issue was actually litigated, is whether the respondent had "a full and fair opportunity to litigate". *Arizona v. California*, 460 U.S. at 619 (quoting *Montana v. United States*, 440 U.S. 147, 153 (1979)). Respondents did, as their brief itself recognizes. (USI Br. 32) USI received and responded to plaintiff's allegations, defended them at trial, and fully briefed them on appeal. There is no manifest injustice in estopping respondents from disputing on remand the facts already found by a competent court.

B. Section 102 Does Not Increase Respondents' Substantive Obligations, nor Create a New Cause of Action.

Respondents assert that section 102 affects substantive rights and obligations by creating a new cause of action, premised upon new injuries, and thus it must be given prospective effect only. (USI Br. at 28-31) In particular, respondents argue that "[t]he substantive rights for plaintiffs under Title VII before the enactment of the Civil Rights Act of 1991 did not include the

right to damages for tort-like personal injuries". (USI Br. at 29)⁹ This argument confuses substantive rights and damages. The substantive rights protected by Title VII are the rights not to be harassed or discriminated against in the workplace on account of one's status; violations of those rights give rise to a cause of action for damages. Expansion of the potential damages allowable to redress a violation of one's preexisting rights is not the same as imposition of a new cause of action.¹⁰

⁹ In making this argument respondents rely on this Court's recent decision in *United States v. Burke*, 112 S. Ct. 1867 (1992). (USI Br. at 28-31) That reliance is misplaced, for the reasons discussed in the brief for the United States and the Equal Employment Opportunity Commission ("EEOC") as amicus curiae supporting petitioners ("U.S. Br."), at footnote 12.

¹⁰ Respondents also maintain that retroactive application of section 102 would be unjust because Congress drew no distinction between compensatory and punitive damages, and the ex post facto imposition of punishment is unjust. (USI Br. at 33) As the amicus brief for the United States and the EEOC notes (U.S. Br. at 23-24 n.13), the issue of whether a distinction should be drawn between compensatory and punitive damages is not properly before the Court. But, because respondent USI and the Equal Employment Advisory Council raise the issue, we briefly respond. The possibility of punitive damages raises no ex post facto or due process concern.

As long as application of the Act to pending cases is supported by a rational legislative purpose, the Due Process Clause will be satisfied. *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984); see also *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 n.13 (1977); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). If there is a regulatory purpose to which the punitive damages may rationally be connected, and the punitive damages do not appear excessive in relation to this regulatory purpose, the punitive damages are regulatory, and will not violate the Due Process Clause. See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). Similarly, the ex post facto analysis turns on whether the damages provisions are regulatory or seek to impose punishment. See *De Veau v. Braisted*, 363 U.S. 144, 160 (1960) (plurality opinion).

Such a rational regulatory purpose exists here. Neither the explicitly remedial compensatory damages provisions, nor the explicitly procedural jury trial right of section 102, can be construed as being "for the purpose of punishment". See *Bell v. Wolfish*, 441 U.S. 520, 538 (1979). The punitive damages provisions pass rational review as a regulatory device to encourage plaintiffs to bring cases and to deter other employers, thereby increasing the

Moreover, the obligation to avoid the conduct below already existed and was not, contrary to what respondents proclaim, "new". (See USI Br. at 28) As Justice O'Connor notes,

"even before the 1991 amendments Title VII reached much more than discrimination in the economic aspects of employment. The protection afforded under Title VII has always been expansive, extending not to just economic inequality, but also to 'working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers' and 'demeaning and disconcerting' conditions of employment".

United States v. Burke, 112 S. Ct. 1867, 1881 (1992) (O'Connor, J., dissenting)-(quoting *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66-67 (1986)).

Ultimately, respondents' argument that the Act imposes new substantive obligations fails. Respondents do not, and cannot, point to a single provision of section 102 that requires them to act in any way differently after November 21, 1991, than before it,

impact and effectiveness of the law. The strict limits placed on damages under section 102(b) further demonstrate that the purpose of these damages is not to "punish" employers but to encourage victims to enforce their rights. For instance, section 102(b)(3) places a cap on both compensatory and punitive damages, varying with the size of the employer.

Louis Vuitton S.A. v. Spencer Handbags Corp., 765 F.2d 966 (2d Cir. 1985), relied upon by the Equal Employment Advisory Council in its amicus brief (at 29), is clearly distinguishable. The court in *Louis Vuitton* refused to apply the treble damages provision of a trademark counterfeiting act to a pending case because of potential ex post facto and due process problems. *Louis Vuitton*, 765 F.2d at 971. Unlike the case here, however, the court found that the legislative history demonstrated that "Congress intended that the Act be applied only prospectively". *Id.* at 972 n.2. Also, the court's evaluation whether the statute was intended to punish was influenced by the fact that the treble damages were mechanically applied, not adjusted based on defendant's conduct. *Id.* at 972. In contrast, the amount of a jury verdict for punitive damages is subject to the jury's exercise of discretion.

or a single provision that imposes liability for conduct that was lawful before November 21, 1991.

IV. A PRESUMPTION THAT LAWS APPLY TO PENDING CASES, ABSENT MANIFEST INJUSTICE, IS GOOD POLICY AND SHOULD BE RETAINED.

A. The *Bradley* Rule Is a Fair and Workable Standard.

Contrary to respondents' assertions (USI Br. at 19-21), case law does not show that *Bradley v. School Board of Richmond*, 416 U.S. 696 (1974), is unworkable or that *Bradley* generated confusion among the lower courts. *Bradley* had been applied by courts without difficulty for twenty years, and until Justice Scalia's concurrence in *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 840 (1990), no court had cast doubt on *Bradley*'s historical premise. While the "apparent tension" between *Bradley* and *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), has created uncertainty among the lower courts as to what law to apply,¹¹ as the cases in Appendix E to Ms. Landgraf's petition for certiorari demonstrate, the *Bradley* presumption itself has provided a clear, fair and workable standard.¹²

¹¹ As discussed at length in petitioner's opening brief, this tension is more apparent than real. (Pet. Br. at 27) Thus, as explained in *Bennett v. New Jersey*, 470 U.S. 632, 639 (1985):

"The Court has refused to apply an intervening change to a pending action where it has concluded that to do so would infringe upon or deprive a person of a right that had matured or become unconditional." [quoting and citing *Bradley*] This limitation comports with another venerable rule of statutory interpretation, i.e., that statutes affecting substantive rights and liabilities are presumed to have only prospective effect."

Given this understanding of *Bradley*, the result in *Bowen* is explicable as an instance in which it would have been manifestly unjust to have retroactively applied the statute at issue, which changed Medicare reimbursement standards. Since hospitals had provided medical services in reliance upon the former standards, their right to reimbursement under those standards had become unconditional.

¹² USI offers no evidence in the case law for its assertion that *Bradley* is

B. *Bradley* Is the Right Rule.

Bradley is not only workable, but it is the correct general rule. The *Bradley* standard allows courts to evaluate the parties' potentially vested rights in the course of deciding whether a new law should apply to pending cases, and yet still provides a clear general rule as to the law to apply: the court applies the law in effect at the time it renders a decision. The *Bowen* rule, if applied more broadly than as an example of "manifest injustice" under *Bradley*, could result in substantial unfairness. The rights of some litigants whose cases are currently pending may be determined, for example as here, according to a legal regime repudiated by Congress, while the rights of other litigants would be determined under the legal regime chosen by Congress.

an unworkable rule that has created judicial confusion, nor is there any such evidence. *Bradley* has been applied by the courts for close to twenty years, in a wide variety of contexts, with no apparent difficulty. See, e.g., *United States v. 6.93 Acres of Land*, 852 F.2d 633, 635-36 (1st Cir. 1988) (amendment to Equal Access to Justice Act); *Black Hills Power & Light Co. v. Weinberger*, 808 F.2d 665, 672 n.5 (8th Cir.) (Competition in Contracting Act of 1984), *cert. denied*, 484 U.S. 818 (1987); *Hyatt v. Heckler*, 757 F.2d 1455, 1458-59 (4th Cir. 1985) (Social Security Disability Benefits Reform Act of 1984); *United States v. Angiulo*, 755 F.2d 969, 970-74 (1st Cir. 1985) (Bail Reform Act of 1984); *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1553-55 (11th Cir.) (1982 amendment to Voting Rights Act), *cert. denied*, 469 U.S. 976 (1984); *Memorial Hosp. v. Heckler*, 706 F.2d 1130, 1136 (11th Cir. 1983) (amendment to Medicare provisions of Social Security Act), *cert. denied*, 465 U.S. 1023 (1984); *Central Freight Lines, Inc. v. United States*, 669 F.2d 1063, 1069-70 (5th Cir. 1982) (Motor Carrier Act of 1980); *Coca-Cola Co. v. Federal Trade Comm'n*, 642 F.2d 1387, 1390 (D.C. Cir. 1981) (Soft Drink Interbrand Competition Act); *Marshall v. Sink*, 614 F.2d 37, 38 n.1 (4th Cir. 1980) (Federal Mine Safety and Health Amendments Act of 1977); *United States v. Elrod*, 627 F.2d 813, 819 (7th Cir. 1980) (Civil Rights of Institutionalized Persons Act); *Chamberlain v. Kurtz*, 589 F.2d 827, 835 (5th Cir.) (amendment to Internal Revenue Code), *cert. denied*, 444 U.S. 842 (1979); *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n*, 580 F.2d 698, 699-700 (D.C. Cir. 1978) (Nuclear Non-Proliferation Act of 1978); *United States v. North Carolina*, 587 F.2d 625, 626 (4th Cir. 1978) (executive branch reorganization approved by Congress), *cert. denied*, 442 U.S. 909 (1979).

Indeed, Judge Easterbrook of the Seventh Circuit justified the *Bradley* rule in another context on precisely the grounds that *Bradley* best effectuates sound Congressional policy: "There must be a rule of decision, and the one in force at the time the court disposes of the case is the one the legislature deems best for adjusting entitlements." *United States v. Kimberlin*, 776 F.2d 1344, 1346 (7th Cir. 1985), *cert. denied*, 476 U.S. 1142 (1986). And, in discussing whether to apply the Bail Reform Act of 1984 to pending cases, Chief Judge Breyer of the First Circuit noted: "Given these purposes [of the statute], it is difficult to see why Congress would not want the new law to apply to those incarcerated at the time it was enacted." *United States v. Angiulo*, 755 F.2d 969, 971 (1st Cir. 1985). Application of the *Bowen* rule—as a general rule, rather than as a special case of "manifest injustice"—would not eliminate uncertainty because, as Justice Scalia's concurrence in *Bonjorno* admits, that rule leaves many important matters unclear. *Bonjorno*, 494 U.S. at 857. To the extent that *Bonjorno* rule is applied to deprive litigants of new rules decided by Congress, its application would cause a great number of cases to be decided for years to come according to rules Congress has abandoned. Moreover, confusion between the two lines of cases would be unavoidable.

Respondents also argue that "[a] presumption of retroactivity is a presumption that human actions may be given consequences that did not exist, and thus were not known, when the actions occurred". (USI Br. at 21) This argument may have applicability when a new law renders unlawful conduct that was legal when engaged in, but certainly not here, where petitioner merely seeks full compensation for conduct that, as we have noted, has been unlawful since 1965. While it is true that petitioner is now entitled to fuller compensation for respondents' unlawful conduct, such enhancement does not run afoul of any constitutional or equitable constraints on the enhancement of remedies. Respondents had no matured or unconditional right to expect that they would not have to remedy fully the injuries caused by their unlawful acts.

Respondents further argue that the manifest injustice inquiry of *Bradley* will allow courts to make decisions based purely on

unfettered policy preferences. (USI Br. at 22) This argument ignores two crucial facts. First, even under Justice Scalia's proposed rule, courts still would be forced to decide whether to apply a new statute to a pending case. Courts would have to start from scratch in applying this proposed rule, while application of *Bradley* is supported by a century and a half of precedent. There is more room for policy preferences when applying a brand-new rule without a substantial body of case law interpreting it than when applying a rule with well-articulated contours. Second, *Bradley*'s manifest injustice inquiry protects against "unfettered policy preferences". Courts do not make decisions under *Bradley* based on their particular policy preferences, but based on whether justifiable expectations are overturned, or whether vested rights are infringed.

In addition, respondents perceive a danger that, absent a presumption against retroactivity, there will be no constraints (except the Constitution) upon Congress's exercise of power. (USI Br. at 23) But respondents recognize that Congress could explicitly make legislation retroactive if it chose to do so. Thus, to that extent, there are no constraints on congressional power to begin with. It is only when Congress fails to exercise its power to make legislation retroactive that a presumption applies. In any event, the argument ignores the manifest injustice aspect of the *Bradley* analysis, which acts as a limit on the reach of retroactive legislation.

Finally, respondents argue that the use of the *Bradley* presumption undermines the administration of justice. Respondents object to two things: that courts will be required to engage in individual determinations of "manifest injustice", and that people will be subjected to unanticipated liabilities (the obligation to pay full compensation for undeniably unlawful past conduct). (USI Br. at 23-24) The latter point is amply taken into consideration by *Bradley*, since the manifest injustice analysis will not permit the imposition of liability if the defendant's conduct conformed to the law in effect at the time of the conduct, and there is no matured or unconditional right to avoid paying full relief for conduct that did not conform to the law.

The former point underestimates both the ability of the courts to engage in individualized, fact-specific inquiries (which, in any case, would be done on a section-by-section basis), and the value of such an inquiry. Adopting any other approach could come at the cost of fairness. Retaining the *Bradley* presumption would allow considerations of fairness to affect decisions, quite properly, in instances where adopting the *Bowen* presumption would not.

CONCLUSION

For the reasons set forth above and in petitioner's brief on the merits, petitioner respectfully requests that this Court remand her case to the court of appeals for an order directing the district court to conduct a jury trial on damages.

August 10, 1993.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

BARBARA LANDGRAF, PETITIONER

v.

USI FILM PRODUCTS, ET AL.

MAURICE RIVERS, ET AL., PETITIONERS

v.

ROADWAY EXPRESS, INC.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURTS OF APPEALS
FOR THE FIFTH AND SIXTH CIRCUITS

**BRIEF FOR THE UNITED STATES AND THE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
AS AMICI CURIAE SUPPORTING PETITIONERS**

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QUESTION PRESENTED

Whether Sections 101 and 102 of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, apply to claims that were pending on the date of enactment.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-757

BARBARA LANDGRAF, PETITIONER

v.

USI FILM PRODUCTS, ET AL.

No. 92-938

MAURICE RIVERS, ET AL., PETITIONERS

v.

ROADWAY EXPRESS, INC.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURTS OF APPEALS
FOR THE FIFTH AND SIXTH CIRCUITS

BRIEF FOR THE UNITED STATES AND THE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
AS AMICI CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES AND THE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

This case concerns the application of the Civil Rights Act of 1991 (Act) to claims that were pending on November 21, 1991, the effective date of the Act. The Act amended Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, as well as 42 U.S.C. 1981. The Department of Justice and the Equal Employment Opportunity Commission (EEOC) share substantial re-

sponsibility for the enforcement of Title VII. In addition, the United States is a defendant in Title VII actions brought by federal employees. The Court's resolution of the question presented in these cases may also affect the application of other statutes enforced by the United States.

STATEMENT

1. In No. 92-757, petitioner Barbara Landgraf was employed by USI Film Products in Tyler, Texas, from September 1984 through January 1986. Throughout her employment, John Williams, a male co-worker, subjected her to "continuous and repeated inappropriate verbal comments and physical contact." 92-757 Pet. App. A2. Landgraf complained repeatedly about the harassment to her direct supervisor, who took no action. Eventually, she reported the harassment to the personnel manager. The personnel manager investigated and found that four other women "corroborated Landgraf's reports of Williams' engaging in inappropriate touching and three women reported verbal harassment." *Ibid.* Williams was not suspended or dismissed, as USI's policy required, but instead received a written reprimand and was transferred to another department. *Ibid.* Shortly thereafter, Landgraf resigned from the company and filed a charge of discrimination with the EEOC.

On July 21, 1989, Landgraf filed suit against USI alleging that she had been sexually harassed and constructively discharged in violation of Title VII. On May 22, 1991, following a bench trial, the district court entered judgment for the respondents. 92-757 Pet. 3-4. The court found that Landgraf had demonstrated that the sexual harassment "was severe enough to make USI a 'hostile work environment' for purposes of Title VII liability." 92-757 Pet. App. A2. The court nevertheless ruled that she was not entitled to any relief, because it found that she had not been constructively discharged as a result of the harassment. The district court found that

"the sexual harassment by Williams was not severe enough that a reasonable person would have felt compelled to resign," *id.* at A4, and that Landgraf in fact resigned because of problems with her co-workers that were unrelated to the Title VII violation, *id.* at A4-A5.

Landgraf appealed, arguing that the district court erred in finding that she had not been constructively discharged. On November 21, 1991, while her appeal was pending, Congress enacted the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. Landgraf's counsel notified the court of appeals of the potential applicability of the new Act to her case, asserting that Sections 102(a)(1) and 102(c) of the Act entitled her to compensatory and punitive damages and the right to a jury trial. 92-757 Pet. App. A2.

The court of appeals affirmed. 92-757 Pet. App. A1-A10. It agreed that Landgraf had "suffered significant sexual harassment" that was "sufficiently severe to support a hostile work environment claim under Title VII." 92-757 Pet. App. A3 (citing *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986)). The court of appeals agreed with the district court, however, that the sexual harassment was "insufficient to support a finding of constructive discharge." *Id.* at A5.

The court of appeals held that the enactment of the Civil Rights Act of 1991 did not entitle Landgraf to a jury trial in which she could seek compensatory and punitive damages. 92-757 Pet. App. A8-A10. The court first concluded that "there is no clear congressional intent on the general issue of the Act's application to pending cases." *Id.* at A8 (citing *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363 (5th Cir. 1992), petition for cert. pending, No. 92-737 (filed Sept. 29, 1992)). The court then noted that the principles governing the application of new statutes to pending cases are "somewhat uncertain" in light of this Court's decisions in *Bradley v. School Board*, 416 U.S. 696 (1974), and *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988).

The court did not resolve this apparent conflict, however, because it found that even under the *Bradley* standard, the new provisions should not be applied in this case. 92-757 Pet. App. A8-A9.

The court was "not persuaded that Congress intended to upset cases which were properly tried under the law at the time of trial." 92-757 Pet. App. A9. The court also concluded that it would be a "manifest injustice" to allow Landgraf to collect compensatory or punitive damages under the new Act, finding that "the amended damage provisions of the Act are a seachange in employer liability for Title VII violations." 92-757 Pet. App. A9-A10.

2. In No. 92-938, petitioners Maurice Rivers and Robert Davison, who are black, were hired as garage mechanics by Roadway Express, Inc., in the early 1970s. In August 1986, Roadway managers directed Rivers and Davison to attend a disciplinary hearing about their work records. 92-938 Pet. App. 2a. Rivers and Davison refused to attend the hearing on the ground that Roadway had failed to provide adequate written notice pursuant to the terms of a collective bargaining agreement. Roadway held the hearing anyway and suspended both petitioners for two days. Petitioners then filed and won grievances challenging the lack of notice. *Ibid.* Shortly thereafter, Roadway's labor relations manager announced that he would hold disciplinary hearings within 72 hours. Rivers and Davison again refused to attend, alleging inadequate notice. On September 26, 1986, Roadway discharged Rivers and Davison, purportedly on the basis of their work records and their refusal to attend the hearings. *Id.* at 3a.

Rivers and Davison filed suit in February 1987, alleging, *inter alia*, that Roadway had discriminated against them on the basis of race in violation of 42 U.S.C. 1981 and Title VII. Petitioners argued that the discharges were racially motivated, and that they were fired in retaliation for enforcing their contractual rights in the grievance hearing in violation of Section 1981. The district court

initially denied Roadway's motion for summary judgment, but dismissed petitioners' Section 1981 discharge and retaliation claims after this Court decided *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). 92-938 Pet. App. 3a-4a, 23a-24a. The district court then held a bench trial on the Title VII claims. On October 18, 1990, the court entered judgment for respondent, finding that petitioners had failed to establish that their terminations were racially motivated. *Id.* at 4a; 92-938 Br. in Opp. App. A1-A13.

Petitioners appealed the dismissal of their Section 1981 claims, arguing that *Patterson* does not preclude a retaliatory discharge claim arising from attempts to enforce contractual rights. While the appeal was pending, Congress passed the Civil Rights Act of 1991. Rivers and Davison then argued that the new Act, reversing the effect of *Patterson*, should be applied to their Section 1981 claims. 92-938 Pet. App. 2a, 4a, 11a.

The court of appeals affirmed in part and reversed in part. 92-938 Pet. App. 1a-14a. It concluded that *Patterson* did not preclude petitioners' Section 1981 claim that they were fired in retaliation for attempting to enforce their contract rights. *Id.* at 7a-9a. The court of appeals affirmed the district court's dismissal of the discriminatory discharge claims under Section 1981, however, holding that *Patterson* applied to claims that were pending at the time of that decision. *Id.* at 6a.

The court also held that the Civil Rights Act of 1991 does not apply to claims that were pending at the time of enactment. 92-938 Pet. App. 11a-14a. The court noted the seemingly conflicting rules of construction established in *Bradley* and *Bowen*, and concluded that the legislative history of the Act "sheds little light on the matter, as Senators expressed conflicting views and no legislative committee reports exist explaining the bill." *Id.* at 11a-12a (citing *Mozee v. American Commercial Marine Serv. Co.*, 963 F.2d 929 (7th Cir.), cert. denied,

113 S. Ct. 207 (1992); *Fray v. Omaha World Herald Co.*, 960 F.2d 1370 (8th Cir. 1992); *Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir.), cert. denied, 113 S. Ct. 86 (1992)). Following *Vogel*, the court held that *Bradley* does not apply where "substantive rights and liabilities" would be affected. 92-938 Pet. App. 13a. The court concluded that application of the Civil Rights Act of 1991 to petitioners' claims would "adversely affect substantive rights and liabilities." 92-938 Pet. App. 14a. The court rejected petitioners' argument that the retroactivity analysis depends upon the particular section at issue, and not whether the Act as a whole is considered retroactive. *Ibid.*¹

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress enacted the Civil Rights Act of 1991 primarily to provide new procedures and remedies to victims of discrimination, including compensatory and punitive damages and jury trials under Title VII. The Act was largely a response to a series of decisions of this Court that Congress viewed as unduly restricting the relief available to plaintiffs alleging violations of their civil rights. The Act "creates few new rules against discrimination, focusing instead on outlining new procedures and remedies to use in new trials." *Mojica v. Gannett Co.*, Nos. 91-3921 & 92-1104 (7th Cir. Mar. 4, 1993), slip op. 9 (Cummings, J., dissenting from order granting rehearing en banc).

These cases present the question whether Sections 101 and 102 of the Act apply to cases that were pending on the date of enactment, as well as to cases filed after the date of enactment challenging pre-enactment con-

¹ Judge Siler dissented from the court's ruling that *Patterson* does not exclude claims under Section 1981 based on retaliation for attempting to enforce contract rights. 92-938 Pet. App. 14a-16a. That question is not at issue in this Court, which limited its grant of certiorari to the retroactivity question.

duct. In answering that question, the first step is to determine, if possible, what Congress intended. "[W]here the congressional intent is clear, it governs." *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990).

A textual analysis of the Act indicates that Sections 101 and 102 apply to pending cases. Sections 109(c) and 402(b) expressly limit the retroactive effect of specified provisions of the Act. 105 Stat. 1078, 1099. Moreover, Section 402(a) states that, "[e]xcept as otherwise specifically provided, this Act * * * shall take effect upon enactment." 105 Stat. 1099. Failure to apply the other provisions of the Act to pending cases would render the qualifying clause "[e]xcept as otherwise specifically provided" unnecessary, in contravention of "the settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect." *United States v. Nordic Village, Inc.*, 112 S. Ct. 1011, 1015 (1992).

The legislative history of the Act does not contradict that analysis. Individual legislators addressed the retroactivity issue, but disagreed on how it should be resolved. Although the President vetoed an earlier bill containing an express retroactivity provision, Congress in turn failed to pass several bills containing express anti-retroactivity provisions.

Even if the text of the Act were not clear on the point, it would be appropriate to apply Sections 101 and 102 to pending cases. In deciding whether new statutes should govern pre-enactment conduct in the absence of clear evidence of congressional intent, courts have perceived a conflict between *Bradley v. School Board*, 416 U.S. 696 (1974), and *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988). In *Bradley*, a case involving attorney's fees, the Court affirmed "the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest

injustice or there is statutory direction or legislative history to the contrary.” 416 U.S. at 711. In *Bowen*, in which the Department of Health and Human Services attempted to recapture payments made to hospitals under prior regulations, the Court said that “[r]etroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.” 488 U.S. at 208.

These cases can be reconciled. In *Bennett v. New Jersey*, 470 U.S. 632 (1985), the Court held that the “substantive provisions of the 1978 Amendments to Title I of the Elementary and Secondary Education Act” do not apply to funds spent more than six years before enactment. 470 U.S. at 633-634. The Court distinguished the case from *Bradley*, relying on a “venerable rule of statutory interpretation, *i.e.*, that statutes affecting substantive rights and liabilities are presumed to have only prospective effect.” 470 U.S. at 639.

Bennett suggests a rule that is both fair and consistent with Congress’s purpose in enacting new legislation: when Congress has not prescribed how new statutes are to be applied to pending cases, substantive provisions (such as those prohibiting conduct that was not illegal before) should not be applied to pending cases. On the other hand, procedural and remedial provisions may be applied to pending cases unless doing so would result in “manifest injustice.” *Bradley*, 416 U.S. at 711. In most cases, it is not manifestly unjust to allow victims of discrimination to benefit from the remedies or procedures that Congress has authorized. In particular, there is no injustice in requiring the wrongdoer, rather than the victim, to bear the costs of injury caused by discriminatory conduct that was unlawful at the time it occurred.

In our view, the provisions of the Civil Rights Act of 1991 at issue here should be applied to petitioners’ claims. Landgraf seeks damages for sexual harassment that the

district court found constituted a violation under existing law. She was denied a remedy for the harassment, even though both lower courts found it to be “significant” and “severe.” 92-757 Pet. App. A2-A3. Allowing her compensation for her injury, as Congress provided in Section 102, comports with basic notions of fairness. Similarly, the *Rivers* petitioners asserted a cause of action under Section 1981 for discriminatory discharge, which the district court dismissed after this Court decided *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). In enacting Section 101, Congress plainly registered its dissatisfaction with this Court’s decision in *Patterson*. Because Congress clearly intended to deny *Patterson* further effect, and because in the present context Section 101 provides a remedy for conduct that was illegal under Title VII, the new Act should be applied to petitioners’ claims.²

² Shortly after the Act was passed, the EEOC issued a Policy Guidance announcing that the EEOC would not process charges for damages for conduct that occurred before November 21, 1991. EEOC Policy Document No. 915.002, Policy Guidance on Application of Damages Provisions of the Civil Rights Act of 1991 to Pending Charges and Pre-Act Conduct (Dec. 27, 1991). That document did not purport to explain an area in which the EEOC has expertise (*i.e.*, Title VII). Instead, it represented the EEOC’s analysis of this Court’s decisions on retroactivity. The EEOC’s initial conclusion that it would follow *Bowen* because it was decided after *Bradley* does not preclude a different analysis here, particularly in light of the EEOC’s recent rescission of the Policy Guidance. EEOC Policy Document No. 915.002, Rescission of Policy Guidance on Application of Damages Provisions of the Civil Rights Act to Pending Charges and Pre-Act Conduct (Apr. 19, 1993).

In addition, the United States has taken the position in a number of lower courts that the provisions of the Act generally do not apply to conduct that occurred before its effective date. See, *e.g.*, U.S. Br. in *Van Meter v. Barr*, No. 92-5046 (D.C. Cir.); U.S. Br. in *Mojica v. Gannett Co.*, Nos. 91-3921 and 92-1104 (7th Cir.). We have re-examined our position and have concluded that it is

ARGUMENT

SECTIONS 101 AND 102 OF THE CIVIL RIGHTS ACT OF 1991 APPLY TO CLAIMS THAT WERE PENDING AT THE TIME OF ENACTMENT

The President signed the Civil Rights Act of 1991 into law on November 21, 1991. Congress found that "additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace." § 2, 105 Stat. 1071. Accordingly, the Act "provide[s] appropriate remedies for intentional discrimination and unlawful harassment in the workplace." § 3, 105 Stat. 1071. Many provisions of the Act "respond to recent decisions of [this] Court by expanding the scope of relevant civil rights statutes in order to provide adequate protections to victims of discrimination." *Ibid.*

The Act comprises a variety of provisions addressing different issues that have arisen under the civil rights statutes in recent years. Section 101 of the Act responds to *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), and provides that the phrase "make and enforce contracts" in 42 U.S.C. 1981 includes "the making, per-

both incorrect and contrary to the longstanding position of the government with respect to statutory retroactivity. See, e.g., U.S. Br. at 17 in *Bennett v. New Jersey*, No. 83-2064 ("statutes affecting substantive rights or obligations are considered prospective only," while statutes "involving procedures, remedies, or prospective relief * * * appl[y] to pending cases"); *United States v. Murphy*, 937 F.2d 1032, 1037-1038 (6th Cir. 1991) (amendments to False Claims Act, 31 U.S.C. 3729-3733); *United States v. Singer Co.*, 889 F.2d 1327, 1333-1334 (4th Cir. 1989) (same); *Schalk v. Reilly*, 900 F.2d 1091, 1096 (7th Cir. 1990) (amendments to Comprehensive Environmental Response, Compensation, and Liability Act of 1980); *United States v. Monsanto Co.*, 858 F.2d 160, 175 (4th Cir. 1988) (same); *Reding v. FDIC*, 942 F.2d 1254, 1256-1257 (8th Cir. 1991) (Financial Institutions Reform, Recovery, and Enforcement Act of 1989); *FDIC v. Wright*, 942 F.2d 1089, 1094-1097 (7th Cir. 1991) (same).

formance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 105 Stat. 1072. Section 102 amends Title VII to allow victims of discrimination to seek compensatory and punitive damages, and permits either party to seek a jury trial if such damages are sought. 105 Stat. 1072.³ Sections 104 and 105, 105 Stat. 1074, respond to this Court's decision in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), and govern burdens of proof in disparate impact cases. Section 106, 105 Stat. 1075, prohibits altering the results of employment-related test scores on the basis of race, color, religion, sex, or national origin. Section 107, 105 Stat. 1075-1076, addresses the type of "mixed motive" case at issue in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and limits relief where the employer proves that the same action would have been taken in the absence of the discrimination. Section 108, 105 Stat. 1076-1077, responds to *Martin v. Wilks*, 490 U.S. 755 (1989), by limiting the ability of non-parties who received adequate notice to challenge Title VII judgments and consent decrees. Section 109, 105 Stat. 1077-1078, responds to *EEOC v. Arabian American Oil Co.*, 111 S. Ct. 1227 (1991), by extending Title VII to U.S. citizens working abroad. In Section 113, 105 Stat. 1079, Congress expanded the definition of attorney's fees to include expert fees.

³ Section 102 permits a plaintiff to recover compensatory and punitive damages in an amount limited by the size of the employer. Plaintiffs may recover no more than \$50,000 if the employer has 15 to 100 employees, no more than \$100,000 if the employer has more than 100 but fewer than 201 employees, no more than \$200,000 if the employer has more than 200 but fewer than 501 employees, and no more than \$300,000 if the employer has more than 500 employees. § 102(b)(3), 105 Stat. 1073. No punitive damages may be awarded against government entities. § 102(b)(1), 105 Stat. 1073.

A. Textual Analysis Of The Act Indicates That, Except As Otherwise Specifically Provided, The Act Applies To Pending Cases

The issue in these cases is whether particular provisions of the Act—Sections 101 and 102—apply to cases that were pending on the date of enactment and that arise out of conduct that occurred before the date of enactment. The issue is often framed in terms of whether the provisions of the Act apply “retroactively.”⁴ The first step in the inquiry is to determine, if possible, the intent of Congress. “[W]here the congressional intent is clear, it governs,” subject only to constitutional limitations. *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990) (citing *Bradley v. School Board*, 416 U.S. 696, 716-717 (1974), and *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988)). “The starting point for interpretation of a statute ‘is the language of the statute itself. Absent a clearly expressed legislative

⁴ The terminology used in this area—“retroactive” (or its synonym, “retrospective”) versus “prospective” application of law—is not always used consistently. The classic definition was stated by Justice Story in *Society for the Propagation of the Gospel v. Wheeler*, 22 Fed. Cas. 756, 757 (C.C.D.N.H. 1814) (No. 13,156):

[E]very statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past, must be deemed retrospective.

Accord 2 N. Singer, *Sutherland Statutory Construction* § 41.01, at 337-338 (4th ed. 1986). This understanding holds whether the change in law occurs during the pendency of litigation, e.g., *Greene v. United States*, 376 U.S. 149 (1964), or precedes any litigation, e.g., *United States v. Security Indus. Bank*, 459 U.S. 70 (1982). It should be noted, however, that “retroactive” is sometimes defined more restrictively, to mean “the application of a change in law to overturn a judicial adjudication of rights that has already become final.” *Kaiser Aluminum*, 494 U.S. at 864 (White, J., dissenting).

intention to the contrary, that language must ordinarily be regarded as conclusive.” *Kaiser Aluminum*, 494 U.S. at 835 (quoting *Consumer Product Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

Textual analysis of the Act indicates that the Act applies to pending cases (and to cases filed after enactment based on pre-enactment conduct) except as otherwise specifically provided by Congress. Section 402 of the Act, the “Effective Date” provision, states:

(a) IN GENERAL.—Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment.

(b) CERTAIN DISPARATE IMPACT CASES.—Notwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983.

105 Stat. 1099. In addition, Section 109(c), part of the section expanding Title VII’s coverage to U.S. citizens working overseas, provides that “[t]he amendments made by this section shall not apply with respect to conduct occurring before the date of the enactment of this Act.” 105 Stat. 1078.

Sections 109(c) and 402(b) expressly limit the retroactive effect of specified provisions of the Act. The inclusion of those provisions suggests that the other provisions of the Act are retroactive. See *Russello v. United States*, 464 U.S. 16, 23 (1983) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion”).

Some courts have concluded that Sections 109(c) and 402(b) merely ensure that certain provisions of the Act will not be applied retroactively. See, e.g., *Johnson v. Uncle Ben’s, Inc.*, 965 F.2d at 1372-1373; *Mozee v. Ameri-*

can Commercial Marine Service Co., 963 F.2d 929, 932-933 (7th Cir.), cert. denied, 112 S. Ct. 207 (1992). But that construction of the statutory language is inconsistent with Section 402(a). Section 402(a) provides: "Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment." 105 Stat. 1099. Standing alone, the phrase "shall take effect upon enactment" might mean that the Act applies retroactively, or merely that it applies to conduct that occurs on or after the effective date. As the Ninth Circuit recognized in *Estate of Reynolds v. Martin*, 985 F.2d 470 (1993), however, that ambiguity disappears when one considers the qualifying clause "[e]xcept as otherwise specifically provided." It is a "settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect." *United States v. Nordic Village, Inc.*, 112 S. Ct. 1011, 1015 (1992). See also *Kungys v. United States*, 485 U.S. 759, 778 (1988). "The qualifying clause of Section 402(a), if it is to mean anything, must mean that the Act contains counterexamples that specifically provide for exceptions to the general rule enunciated elsewhere in section 402(a)." *Reynolds*, 985 F.2d at 473. The express prospectivity provisions of Sections 109(c) and 402(b) are the only plausible exceptions to the general rule of Section 402(a).⁵ Accordingly, the text of the statute indicates that, except as otherwise

⁵ In *Butts v. City of New York Dep't of Housing Preservation and Dev.*, No. 92-7850 (2d Cir. Mar. 24, 1993), the court suggested that the qualifying clause of Section 402(a) might apply to Section 204(b) (which requires the Glass Ceiling Commission to submit a report not later than 15 months after enactment) and to Section 303(b)(4) (which requires an official to be appointed within 90 days after enactment). 105 Stat. 1084, 1089. That suggestion is unpersuasive. The time periods specified in Sections 204(b) and 303(b)(4) began to run on November 21, 1991. Consequently, those provisions were effective upon enactment and cannot serve as counterexamples to the general rule of Section 402(a).

specifically provided (in Sections 109(c) and 402(b)), the Act applies to pending cases.

B. The Legislative History Does Not Express A Clear Legislative Intention That The Act Should Not Apply To Pending Cases

The legislative history of the Act does not undermine the foregoing textual analysis. No conference report or committee reports accompanied the Act. Although individual legislators addressed the retroactivity question, they did not agree on how it should be resolved. See *Fray v. Omaha World Herald Co.*, 960 F.2d 1370, 1376 n.10 (8th Cir. 1992) (collecting citations to conflicting statements and "interpretive memoranda" of various legislators). Any attempt to draw inferences from this welter of conflicting statements would validate the observation of the late Judge Leventhal that reviewing legislative history is like "looking over a crowd and picking out your friends." Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L. Rev. 195, 214 (1983). Indeed, Senator Danforth, an opponent of retroactivity, candidly stated (137 Cong. Rec. S15,325 (daily ed. Oct. 29, 1991)):

[A] court would be well advised to take with a large grain of salt floor debate and statements placed into the Congressional Record which purport to create an interpretation for the legislation that is before us.

Most courts of appeals have heeded that warning and properly refused to accord any weight to the Act's legislative history, in which one can find ample support for either position.⁶ In *Fray*, however, the Eighth Circuit

⁶ See *Luddington v. Indiana Bell Tel. Co.*, 966 F.2d 225, 227 (7th Cir.), petition for cert. pending, No. 92-977 (filed Dec. 3, 1992); *Butts v. City of New York*, No. 92-7850 (2d Cir. Mar. 24, 1993), slip op. 2219; *Reynolds*, 985 F.2d at 477; *Baynes v. AT&T Technologies, Inc.*, 976 F.2d 1370, 1372 (11th Cir. 1992); *Gersman v. Group Health Ass'n*, 975 F.2d 836, 892 (D.C. Cir. 1992); *John-*

concluded that the legislative history demonstrated that Section 101 should not be applied retroactively because the President had vetoed an earlier bill containing an explicit retroactivity provision.⁷ In that court's view, "[w]hen a bill mandating retroactivity fails to pass, and a law omitting that mandate is then enacted, the legislative intent was surely that the new law be prospective only." 960 F.2d at 1378. The Eighth Circuit overlooked the fact that Congress failed to pass bills containing explicit anti-retroactivity provisions.⁸ Consequently, the legislative history does not reveal a clear congressional intention that the Act should not be applied retroactively.

son, 965 F.2d at 1372; *Mozee*, 963 F.2d at 934; *Vogel v. City of Cincinnati*, 959 F.2d 594, 597-598 (6th Cir.), cert. denied, 113 S. Ct. 86 (1992).

⁷ In 1990, Congress passed a bill that expressly applied to pending cases, as well as to certain cases in which final judgment had been entered and the time to appeal had expired. H.R. Conf. Rep. No. 856, 101st Cong., 2d Sess. 9 (1990). The President vetoed the bill and referred to the retroactivity provision as "unfair." 136 Cong. Rec. S16,419 (daily ed. Oct. 22, 1990). The veto was sustained.

⁸ In early 1991, Senator Dole introduced a bill containing language expressly limiting the new provisions to conduct that occurred after enactment. 137 Cong. Rec. S3021, S3023 (daily ed. Mar. 12, 1991). The Senate never voted on the bill. In June 1991, Representative Michel proposed the same anti-retroactivity language as part of a substitute bill in the House, but the substitute was rejected by a vote of 266 to 162. 137 Cong. Rec. H3898, H3908 (daily ed. June 4, 1991).

Proposals to include express anti-retroactivity provisions in the 1990 bill were also unsuccessful. The Michel-LaFalce bill would have exempted all pre-existing claims from coverage. 136 Cong. Rec. H6746-H6747 (daily ed. Aug. 3, 1990). That bill was rejected by a vote of 238 to 188. 136 Cong. Rec. H6768 (daily ed. Aug. 3, 1990). Two other proposals to limit the retroactive effect of the legislation were also unsuccessful. See 136 Cong. Rec. H6786 (daily ed. Aug. 2, 1990) (statement of Rep. Moorhead); H.R. Rep. No. 644, 101st Cong., 2d Sess. Pt. 1, at 90 (1990).

Although individual legislators had different beliefs about the meaning of the Act, "those individual members' beliefs [are] unimportant, given the clear text of the Act." *Reynolds*, 985 F.2d at 478.

C. In The Absence Of Clear Evidence Of Congressional Intent, It Is Proper For Courts To Presume That Procedural And Remedial Provisions Apply To Pending Cases

Even if the textual analysis set forth above were not dispositive, it would nevertheless be appropriate to apply Sections 101 and 102 in these cases. Although this Court has noted an "apparent tension" in its prior decisions concerning the retroactive effect of statutes, *Kaiser Aluminum*, 494 U.S. at 837, the tension is just that—more apparent than real. Under this Court's decisions, the presumption against retroactive application of new statutes generally applies only to substantive provisions. In contrast, procedural and remedial provisions generally apply to pending cases and to cases filed after the effective date of the legislation.

1. In *Bradley v. School Board*, 416 U.S. 696 (1974), a unanimous Court held that the attorney's fee provisions of the Education Amendments of 1972 could be applied in a case pending on appeal to allow plaintiffs to recover attorney's fees incurred prior to the effective date of the Act. The Court relied on "the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." 416 U.S. at 711.⁹

⁹ The Court in *Bradley* relied on its prior decision in *Thorpe v. Housing Authority*, 393 U.S. 268 (1969). In *Thorpe*, the Department of Housing and Urban Development had issued a circular while the petitioner's case was pending in this Court. The circular required local housing authorities to afford tenants in federally assisted housing projects prior notice of the reasons for an eviction

In *Bradley*, the Court identified three factors relevant to determining whether applying the law in effect at the time of the court's decision would result in manifest injustice: "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." 416 U.S. at 717. As to the first concern, the Court agreed with Chief Justice Marshall's statement in *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 102, 110 (1801), that in "great national concerns * * * the court must decide according to existing laws," although the courts should "struggle hard against a construction which will, by a retrospective operation, affect the rights of parties * * * in mere private cases between individuals." 416 U.S. at 717, 719. As to the second concern, the Court asked whether application of an intervening change in the law "would infringe upon or deprive a person of a right that had matured or become unconditional." *Id.* at 720. The third concern "stems from the possibility that new and unanticipated obligations may be imposed upon a party without notice or an opportunity to be heard." *Ibid.*

2. In *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), the Department of Health and Human Services (HHS) issued a cost-limit schedule under the Medicare Act that would have recouped payments already made to hospitals under an earlier version of the regulations. The Court unanimously held that HHS had no statutory authority to promulgate retroactive regulations. The Court observed that "[r]etroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." 488 U.S. at

and an opportunity to respond. The Court held that the circular applied to petitioner, even though the housing authority had already secured an eviction order that had been affirmed by the North Carolina Supreme Court.

208 (citing *Greene v. United States*, 376 U.S. 149, 160 (1964); *Claridge Apartments Co. v. Commissioner*, 323 U.S. 141, 164 (1944); *Miller v. United States*, 294 U.S. 435, 439 (1935); *United States v. Magnolia Petroleum Co.*, 276 U.S. 160, 162-163 (1928)).

3. In *Kaiser Aluminum*, 494 U.S. at 827, the Court considered whether the postjudgment interest provisions of the Federal Courts Improvement Act of 1982, amending 28 U.S.C. 1961, applied to judgments entered before the effective date of the Act. In *Kaiser Aluminum*, the Court was not required to "reconcile" the "apparent tension" between *Bradley* and *Bowen*, because the language of the statute "evidence[d] clear congressional intent that amended § 1961 is not applicable to judgments entered before its effective date." 494 U.S. at 837-838.

4. The Court's decision in *Bennett v. New Jersey*, 470 U.S. 632 (1985), provides a basis for resolving the apparent tension between *Bowen* and *Bradley*. In *Bennett*, the Court held that the "substantive provisions" of the 1978 Amendments to Title I of the Elementary and Secondary Education Act did not apply "retroactively for determining if Title I funds were misused during the years 1970-1972." 470 U.S. at 633-634. The Court concluded that "[b]oth the nature of the obligations that arose under the Title I program and *Bradley* itself suggest that changes in substantive requirements for federal grants should not be presumed to operate retroactively." 470 U.S. at 638. The Court noted *Bradley*'s express limitation that an "intervening change" should not apply to a pending action when "to do so would infringe upon or deprive a person of a right that had matured or become unconditional." 470 U.S. at 639 (quoting *Bradley*, 416 U.S. at 720). "This limitation comports with another venerable rule of statutory interpretation, *i.e.*, that statutes affecting substantive rights and liabilities are presumed to have only prospective effect." 470 U.S. at 639. See also *Greene v. United States*, 376 U.S. 149,

160 (1964) ("a retrospective operation will not be given to a statute which interferes with antecedent rights"); *Union Pac. R.R. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913) (same); *United States v. Heth*, 7 U.S. (3 Cranch) 399, 413 (1806) (same).

Bennett is consistent with a long line of decisions of this Court applying new statutory provisions that are procedural or remedial in nature in pending litigation. See, e.g., *Ex parte Collett*, 337 U.S. 55, 71 (1949) (*forum non conveniens* rule); *Bonet v. Texas Co.*, 308 U.S. 463, 467 (1940) (method of collecting compensation awards); *Hallowell v. Commons*, 239 U.S. 506, 508 (1916) (statute transferring jurisdiction from district court to executive agency); *Railroad Co. v. Grant*, 98 U.S. 398, 401 (1879) (statute conferring exclusive authority on Secretary of the Interior); *Sampeyrac v. United States*, 32 U.S. (7 Pet.) 222, 239 (1833) ("Almost every law, providing a new remedy, affects and operates upon causes of action existing at the time the law is passed."). See also 2 N. Singer, *Sutherland Statutory Construction* § 41.04, at 349 (4th ed. 1986) (procedural statutes and remedial provisions that do not take away vested rights apply to pending actions); H. Black, *Handbook on the Construction and Interpretation of the Laws* § 120, at 403-408 (2d ed. 1911) (laws authorizing new or enlarged remedies for existing causes of action or changing rules of procedure or evidence apply to pending actions, unless vested rights would be disturbed).¹⁰

¹⁰ The decisions discussed in Justice Scalia's concurring opinion in *Kaiser Aluminum*, see 494 U.S. at 842-844, are not to the contrary. Those decisions concerned the application of what were deemed to be statutes changing substantive rights, rather than procedural or remedial statutes, to pending cases. An article cited by Justice Scalia makes that point clear. See 494 U.S. at 842. The author of the article explains that retroactivity doctrine in the United States developed as "an inhibition against a construction which * * * would violate vested rights." Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 Minn. L. Rev. 775, 784 (1936).

Accordingly, substantive changes—e.g., a statutory change that makes illegal conduct that formerly was legal—should not be applied to a case in which the underlying conduct occurred before the statute's effective date. See *Bowen*, 488 U.S. at 204. But procedural or remedial changes should be applied to a pending case unless Congress has specified otherwise, or unless their application would result in "manifest injustice." *Bradley*, 416 U.S. at 711; *Thorpe*, 393 U.S. at 282. This approach to reconciling *Bradley* and *Bowen* focuses on the nature of the particular statutory provision at issue, rather than on the statute as a whole. It reflects the reality that Congress may enact statutes that contain a mixture of substantive, procedural, and remedial provisions. We therefore disagree with the suggestion (see 92-938 Pet. App. 14a) that courts should always make a single retroactivity determination for an entire statute.

We acknowledge that it will not always be obvious whether a provision should be classified as substantive, procedural, or remedial. But as the Court noted in another context in *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945), "[t]he abstract logic of the distinction between substantive rights and remedial or procedural rights may not be clear-cut, but it has been found a workable concept to point up the real and valid difference between rules in which stability is of prime importance and those in which flexibility is a more important value." In addition, we do not suggest that any new provision that may be labeled "remedial" or "procedural" must be applied to all pending cases. Courts have flexibility not to apply a new procedural or remedial provision in order to avoid manifest injustice.¹¹

¹¹ In addition, a different presumption may be appropriate if the suit is against the government, because statutory waivers of sovereign immunity are strictly construed, and must be express rather than implied. See *United States Department of Energy v. Ohio*, 112 S. Ct. 1627, 1633 (1992); *Ardestani v. INS*, 112 S. Ct.

D. Sections 101 and 102 Apply To Petitioners' Claims

1. Section 102 Applies to Landgraf's Sexual Harassment Claims

In *Landgraf*, both the court of appeals and the district court held that petitioner was sexually harassed in violation of Title VII. While the case was pending on appeal, Congress passed the Act. Section 102 of the Act permits victims of sexual harassment to recover compensatory and punitive damages, as well as backpay. The Act thus expands the remedies available for acts of intentional discrimination, but does not alter the scope of the employee's basic right to be free from discrimination or the employer's corresponding legal duty.

Because compensatory damages are an additional remedy for intentional misconduct that was illegal under Title VII before the effective date of the 1991 Act, applying the new provisions to pending cases is appropriate under *Bradley* and *Bowen*. "Modification of remedy merely adjusts the extent, or method of enforcement, of liability in instances in which the possibility of liability previously was known." *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 93 (D.C. Cir.), cert. denied, 449 U.S. 905 (1980) (removal of ceiling for workers' compensation disability is remedial and immediately applicable). See also *Womack v. Lynn*, 504 F.2d 267, 269 (D.C. Cir. 1974) (new remedy for discrimination applied to pending case because federal employees' "right to be free of such discrimination has been assured for years") (emphasis omitted). Thus, while "[r]etroactive creation of legal responsibilities or abolition of legal rights risks unfairness because the retroactive change confounds the expecta-

515, 520 (1991). See also *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) ("Congress may abrogate the States' constitutionally secured immunity from suit only by making its intention unmistakably clear in the language of the statute.").

tion upon which persons acted," changes in remedies "often do not involve the same degree of unfairness." *Hastings*, 628 F.2d at 93.¹²

The court of appeals concluded that applying the damages provisions of Section 102 to conduct that occurred before the effective date of the Act would be unfair to employers who did not foresee that they might be liable for more than backpay. See 92-757 Pet. App. A10 (compensatory damages represent "a seachange in employer liability"); see also *Luddington*, 966 F.2d at 228-229. But Section 102 applies only to intentional acts of discrimination that were illegal under Title VII at the time they were committed. "[T]here is no such thing as a vested right to do wrong." *Freeborn v. Smith*, 69 U.S. (2 Wall.) 160, 175 (1865). Consequently, it is not unfair to require employers to compensate the victims of illegal discrimination for injury caused by the employer's illegal conduct. Indeed, *Bradley* authorized basically comparable relief (an award of previously unauthorized attorney's fees, which would not have been incurred but for the wrongdoer's unlawful conduct).¹³

¹² In holding that backpay awards are taxable as ordinary income in *United States v. Burke*, 112 S. Ct. 1867, 1874 & n.12 (1992), the Court noted that the damages provisions of the Civil Rights Act of 1991 reflect a "marked change in [Congress's] conception of the injury redressable by Title VII, and cannot be imported back into analysis of the statute as it existed at the time of this lawsuit." That statement does not address the question whether Section 102 should be considered "substantive" in the context of the Act's application to pending claims for make-whole relief.

¹³ We think it is a much different and more difficult question whether the punitive damages provisions of Section 102 should be applied to cases involving conduct that occurred prior to the effective date of the Act. By definition, punitive damages do not merely compensate the victim for his or her injury. And we are not aware of any statute in which Congress has explicitly applied a provision allowing punitive damages to conduct that occurred before the statute was enacted—a consideration relevant to the

Concern for employers must be balanced against concern for the victims of intentional discrimination. If the employer does not bear the cost of intentional discrimination, that cost will be borne by the victim. In striking that balance, it is important to bear in mind that Title VII cases are not "mere private cases between individuals," *The Schooner Peggy*, 5 U.S. (1 Cranch) at 110, but instead are concerned with unlawful discrimination, one of the greatest of our national concerns. In enacting the compensatory damages provisions of Section 102, Congress determined that the employer, rather than the victim, should bear the full cost of the discrimination. 137 Cong. Rec. S15,338 (daily ed. Oct. 29, 1991) (statement of Sen. DeConcini) (Congress intended to "place the injured party, inasmuch as possible, in the same position he or she would have been in the absence of the discriminatory act against the person"). There is nothing unjust about holding the wrongdoer responsible for injuries caused by conduct that has been illegal for almost 30 years. Accordingly, *Landgraf* should be remanded for a hearing on appropriate damages under Section 102.¹⁴

question of presumed legislative intent. We note, however, that any potential unfairness to employers is mitigated by Section 102 (b) (1), which allows the jury to award punitive damages only if the plaintiff demonstrates that the employer "engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." The courts below concluded that Section 102 as a whole should not be applied to pre-enactment conduct, and therefore did not consider the arguments for drawing a distinction between compensatory and punitive damages. We believe it would be appropriate for the Court to follow its usual course and not address a question that was not considered or decided by the courts below.

¹⁴ In cases in which the district court entered an error-free judgment for the defendant prior to the Act's effective date, we do not believe plaintiffs are entitled to retrial merely on the ground that a jury might reach a different result as to liability. Cf. *Kremer*

2. Section 101 Applies to Petitioners' Claims in Rivers

In *Rivers*, the conduct at issue occurred before the effective date of the Act and before the Court decided *Patterson*. While the case was pending in the district court, this Court decided *Patterson*. The district court dismissed the Section 1981 discriminatory discharge claim in light of *Patterson*. While the case was pending on appeal, Congress passed the new Act.

There is no doubt that Section 101 expands the scope of Section 1981 to cover conduct that did not violate Section 1981 as construed by this Court in *Patterson*. In most cases, however—including this one—Section 101 applies to conduct that was already illegal under Title

v. *Chemical Construction Co.*, 456 U.S. 461, 481 (1982) (prior determination against Title VII plaintiff in state proceedings bars Title VII claim, by collateral estoppel, unless there is reason to doubt quality, extensiveness, or fairness of procedures followed in prior litigation). If the district court has entered judgment for the plaintiff on the liability issue, however, we believe cases on appeal should be remanded for a determination of damages. Because Section 102 provides for jury trials in cases in which plaintiffs seek compensatory and punitive damages, it is arguable that Seventh Amendment considerations require that defendants in such a situation have an opportunity to relitigate the liability issue before a jury. Cf. *Lytle v. Household Manufacturing, Inc.*, 494 U.S. 545 (1990) (Seventh Amendment precludes according collateral-estoppel effect to district court's determination of issues common to equitable and legal claims where the court resolved the equitable claims first solely because it erroneously dismissed the legal claims). In our view, the considerations set out above warrant application of Sections 101 and 102 to pending cases, even if turns out that, in limited circumstances, the entire case must be retried. In the alternative, however, the Court might hold that the new provisions should be applied to pending cases unless their application would require a retrial. See *Mojica v. Gannett Co.*, Nos. 91-3921 & 92-1104 (7th Cir. Mar. 4, 1993) (Cummings, J., dissenting from order granting rehearing en banc) (suggesting that the Act should be applied to pending cases that had not yet been tried); *Mozee*, 963 F.2d at 937 (same).

VII long before November 21, 1991.¹⁵ *Fray*, 960 F.2d at 1378 (conduct covered by Section 101 "was clearly actionable under Title VII"); *Mozee*, 963 F.2d at 941 (Cudahy, J., dissenting) ("Section 101 merely provides new remedies for old wrongs."); see also *O'Hare v. General Marine Transport Corp.*, 740 F.2d 160, 171 (2d Cir. 1984), cert. denied, 469 U.S. 1212 (1985) (ERISA amendment awarding interest and attorney's fees applies to pending case where employer was liable under a different provision before the amendment). Consequently, "application of § 101 to [a] pending case would neither alter the rights and expectations of the parties nor disturb previously vested rights." *Fray*, 960 F.2d at 1378.¹⁶

In addition, Congress viewed Section 101 as restoring a remedy for Section 1981 violations that was eliminated by *Patterson*, which denied remedies to victims of discrimination in hundreds of cases that were pending at the time of the decision. See 136 Cong. Rec. S9336 (daily ed. July 10, 1990) (statement of Sen. Hatch); 137 Cong.

¹⁵ In the present case, the district court ruled that the employer was not liable under Title VII. The court of appeals nonetheless properly ruled that the district court's holding under Title VII did not have a collateral estoppel effect on the Section 1981 claims. See *Lytle v. Household Mfg., Inc.*, 494 U.S. 545 (1990). Because the Sixth Circuit has remanded the other Section 1981 issue to be tried before a jury, application of the Act would not require the district court to conduct additional proceedings. See 92-938 Pet. App. 9a-10a.

¹⁶ Not all conduct that is proscribed by Section 101 was also unlawful under Title VII or another civil rights law. For example, Title VII does not apply to employers with fewer than 15 employees. 42 U.S.C. 2000e(b). Moreover, Section 1981 is not limited to the employment context. See, e.g., *Runyon v. McCrary*, 427 U.S. 160 (1976). Under the view we advance, Section 101 would not apply to conduct that was not unlawful at the time it occurred. In addition, punitive damages were not available under Title VII prior to the Act. If the Court were to conclude that punitive damages should not be available under Section 102 to plaintiffs injured by pre-Act conduct, see note 13, *supra*, we believe that the same result would be appropriate under Section 101.

Rec. S15,383 (daily ed. Oct. 29, 1991) (statement of Sen. Jeffords); 136 Cong. Rec. S9321 (daily ed. July 10, 1990) (statement of Sen. Kennedy). As Senator Leahy described the result of *Patterson* (137 Cong. Rec. S15,489 (daily ed. Oct. 30, 1991)):

If, for example, an employer intentionally harasses or otherwise persecutes an employee solely on account of race, the current civil rights laws cannot require the employer to compensate that person fully for the damage he has caused, no matter how great or how real. Nor can the employer be forced to pay punitive damages no matter how outrageous his conduct has been. By overturning the Supreme Court's decision in *Patterson* versus McLean Credit Union, the Civil Rights Act of 1991 would remedy this injustice.

See also 137 Cong. Rec. S15,483 (daily ed. Oct. 30, 1991) (statement of Sen. Simpson) ("almost everyone agree[d]" that *Patterson* needed to be "overturn[ed]"); 137 Cong. Rec. S15,383 (Oct. 29, 1991) (statement of Sen. Jeffords) ("[e]very civil rights proposal made over the past year-and-a-half has included a *Patterson* reversal as one of its terms"); 137 Cong. Rec. S15,285 (Oct. 28, 1991) (statement of Sen. Seymour) (bill restoring remedies under Section 1981 was "noncontroversial"). Where Congress unequivocally finds that a recent Supreme Court decision unfairly denies a remedy for discrimination, it is proper for the courts to infer that Congress intended for the curative legislation to apply to pending cases, and to deny the contrary decision any further effect. Cf. *Lussier v. Dugger*, 904 F.2d 661 (11th Cir. 1990) (Civil Rights Restoration Act of 1987 reversing *Grove City* decision applied to pending case); *Ayers v. Allain*, 893 F.2d 732, 754-755 & n.116 (5th Cir.), vacated on other grounds, 914 F.2d 676 (5th Cir. 1990) (en banc), vacated *sub nom. United States v. Fordice*, 112 S. Ct. 2727 (1992) (same). But see *DeVargas v. Mason & Hanger-Silas Mason Co.*, 911 F.2d 1377 (10th Cir.

1990), cert. denied, 111 S. Ct. 799 (1991). As the Ninth Circuit observed in *Reynolds*, it "would seriously undermine Congress' stated intent" if the Court were to hold that "the decisions [Congress] repudiated would live on in the federal courts for * * * years." 985 F.2d at 475-476. See also *Mojica*, slip op. 12 (Cummings, J., dissenting from order granting rehearing en banc) ("It would be sophistry to suggest that *Patterson* should have lingering effect in new civil rights cases for years to come, when Congress has so emphatically expressed its disapproval of that decision.").

CONCLUSION

The judgments of the courts of appeals should be reversed, and the cases remanded for further proceedings.

Respectfully submitted.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BARBARA LANDGRAF,

Petitioner,

v.

USI FILM PRODUCTS, *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

MAURICE RIVERS AND ROBERT C. DAVISON,

Petitioners,

v.

ROADWAY EXPRESS, INC.,

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**BRIEF FOR THE NATIONAL ASSOCIATION FOR THE
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AMERICAN ASSOCIATION OF RETIRED PERSONS,
THE AMERICAN JEWISH COMMITTEE, AND THE
ANTI-DEFAMATION LEAGUE AS AMICI CURIAE IN
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IN THE
Supreme Court of the United States
 OCTOBER TERM, 1992

No. 92-757

BARBARA LANDGRAF,

Petitioner,

v.

USI FILM PRODUCTS, BONAR PACKAGING, INC. AND
 QUANTUM CHEMICAL CORPORATION,
Respondent.

No. 92-938

MAURICE RIVERS

and

ROBERT C. DAVISON,

Petitioners,

v.

ROADWAY EXPRESS, INC.,

Respondent.

**BRIEF FOR THE NATIONAL ASSOCIATION FOR THE
 ADVANCEMENT OF COLORED PEOPLE, THE
 AMERICAN ASSOCIATION OF RETIRED PERSONS,
 THE AMERICAN JEWISH COMMITTEE, AND THE
 ANTI-DEFAMATION LEAGUE AS AMICI CURIAE IN
 SUPPORT OF THE PETITIONERS**

INTEREST OF THE AMICI¹

The National Association for the Advancement of Colored People ("NAACP") is a nonprofit membership organization with a substantial number of members nationwide. The NAACP has chartered affiliates in each of the fifty states of the United States. Since its founding in 1909, one of the principal goals of the NAACP has been to insure that minority group citizens have as fair and equal employment opportunities as are enjoyed by white citizens. The cases currently before this Court are of particular importance to the members and supporters of the NAACP, in view of the large number of claims that would be completely precluded by the affirmance of the decisions below. For example, the NAACP initially funded and has supported the case of *Howard R.L. Cook et al. v. Billington*, No. 82-0400 (D.D.C. February 10, 1982), which challenges conduct dating to 1974 but has not yet had a final judgment in the District Court. The outcome of the cases before this Court will have a substantial impact upon *Cook* and hundreds of other cases alleging racial discrimination.

The American Association of Retired Persons ("AARP") is a nonprofit membership organization of persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. More than one-third of AARP's thirty-four million members are employed, and most of them are protected by Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq.*, and the Age Discrimination in Em-

¹ The petitioners and respondents in both cases have consented to the filing of this Brief, and copies of the parties' consent letters have been filed with the Clerk.

ployment Act, 29 U.S.C. § 621 *et seq.* One of AARP's primary objectives is to strive to achieve dignity and equality in the workplace through positive attitudes, practices, and policies regarding work and retirement. In pursuit of this objective, AARP has participated as *amicus curiae* in numerous discrimination cases before this Court and the federal Courts of Appeals.

The American Jewish Committee ("AJC") is a national membership organization founded in 1906 to protect the civil and religious rights of Jews. AJC has always believed that these rights can be secure only if they are equally secure for all Americans, irrespective of race, faith, national origin or gender. AJC, therefore, has been actively involved in the civil rights cause since its inception, and strongly supported enactment of the Civil Rights Act of 1991. AJC also urged the United States Equal Employment Opportunity Commission to rescind its Policy Guidance denying the application of the damages provisions of the Act to pending cases and pre-Act conduct. AJC believes that both the language of the Civil Rights Act of 1991 and the legislative intent behind that statute mandate retroactive application to pre-Act conduct and pending cases. AJC maintains that retroactive application is the only way to insure one of the main purposes of the Civil Rights Act of 1991: to secure new remedies for victims of discrimination.

Since 1913, the nonprofit Anti-Defamation League ("ADL") has pursued the objective set out in its Charter "to secure justice and fair treatment to all citizens alike." In order to further this objective, ADL has fought steadfastly in Congress, courts, and the public arena to remove barriers which have prevented individuals from enjoying fully the rights protected

by federal civil rights laws. Most recently, ADL supported the enactment of the Civil Rights Act of 1991 as an effort to redress the inequities stemming from several Supreme Court decisions. ADL believes the application of the Act to pre-Act conduct being challenged in the pending cases is consistent with the intent of Congress and is crucial to protect the interests of victims of racial, sexual, national origin, or religious discrimination.

SUMMARY OF ARGUMENT

The Civil Rights Act of 1991, Pub. L. No. 102-166 (1991), applies to all cases alleging discrimination in employment that were pending when the Act was passed. The statutory language and the overall scheme of the 1991 Act demonstrate that Congress intended for the Act to apply to cases pending at the time of its enactment. Moreover, retroactive application is entirely in keeping with the manner Congress and this Court have treated prior civil rights statutes. Both the Civil Rights Act of 1960 and the 1972 Amendments to the Civil Rights Act of 1964 were applied by this Court to cases pending at the time of their enactment. In light of the procedural and remedial changes implemented by the Civil Rights Act of 1991, it, too, should be applied to pending cases.

If this Court were to find that the Act does not apply to all such pending cases, enormous resources in terms of the time, money, and energy of courts, attorneys, and parties would be wasted on the interpretation of the numerous cases which were repudiated by the Act. Moreover, if the Act is not applied retroactively, thousands of individual victims of discrimination will be left without a remedy or with only

partial remedies for the wrongs that they have suffered.

ARGUMENT

Title I of the Civil Rights Act of 1991, Pub. L. No. 102-166 (1991), (the "1991 Act" or "Act") applies to all cases alleging discrimination in employment that were pending when the Act was passed. The 1991 Act creates no new substantive rights, nor does it change the substantive law of civil rights. Discrimination on the basis of race, color, religion, sex, or national origin has long been unlawful, and the 1991 Act does not alter that essential principle of American national policy. Rather, the Act provides victims of unlawful discrimination with additional remedies for the protection of their pre-existing right to be free from that discrimination.

As remedial legislation, therefore, the Civil Rights Act of 1991 applies to cases pending at the time the law was passed. Moreover, the application of the 1991 Act to pending cases is consistent with and supported by the plain language of the Act, the purposes of the Act, and the nation's long-standing policy to eradicate discrimination.

If the Act is not applied to cases pending at the time of its enactment, there will be dramatic consequences to individual victims of discrimination and to the justice system as a whole. Thousands of individuals who brought claims in good faith, based on generally accepted interpretations of laws which existed at the time their lawsuits commenced, will have those

claims rejected by courts based on subsequent statutory interpretations that have been unambiguously rejected by Congress. Thousands of individuals will find themselves without any remedy, even if a court determines that they were the victims of unlawful discrimination. Thousands of government employees will continue to be second-class citizens long after Congress has determined that their remedies for discrimination should more closely approximate those of private-sector employees. Courts at all levels will struggle with civil rights cases that must proceed on two incompatible tracks—one recognizing and proceeding in accordance with the Congressionally-mandated track of post-1991 Act cases, and the other proceeding along an out-dated and Congressionally-repudiated track of pre-1991 Act cases.² In order to avoid these immeasurable harms, this Court must find the Civil Rights Act of 1991 to apply to cases pending at the time of the statute's enactment.

² Some cases would be fated to continue along *both* tracks. For example, in the *Cook* litigation sponsored by amicus NAACP, one phase of the case has proceeded to an interlocutory finding of liability and an interlocutory award of damages, a second phase has proceeded to an interlocutory finding of liability, and a third phase has not yet proceeded to a finding of liability or damages. Nevertheless, these three phases will likely be appealed simultaneously, presumably forcing the Court to apply pre-1991 Act law to the first phase, post-1991 Act law to the third phase, and an undetermined law to the middle phase. For example, the burdens of proof set forth in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), have already been applied to the first two phases; however, they may not apply to the third phase, despite the fact that all three phases involve many of the same individual victims of discrimination. Such confusion will ultimately result in harm to parties and to courts.

I. If This Court Fails to Find the Act Retroactive, Vast Judicial Resources Will be Wasted to Preserve Dis-favored Law.

There can be no dispute that litigation consumes enormous resources in terms of time, money, and the energy of courts, attorneys, and parties. This expense is particularly great in civil rights actions, which are notoriously long and complex, frequently spanning up to a decade and encompassing classes that number up to thousands of individuals. If this Court fails to find that the 1991 Act applies to cases pending at the time of its enactment, it will in effect mandate that decades of court time, decades of parties' time, decades of attorneys' time, and millions of dollars be spent dissecting and refining a body of law—the eight cases which were reversed by Congress in the Act—which is no longer valid. Congress simply cannot be presumed to have intended a waste of judicial and other resources of this magnitude.

In the eight cases corrected by the Act, the discriminatory conduct at issue was, on average, nearly 8.7 years old by the time the cases reached the Court.³

³ See *EEOC v. Arabian American Oil Co.*, ___ U.S. ___, 111 S. Ct. 1227 (1991) (plaintiff dismissed in 1974); *West Virginia University Hosp., Inc. v. Casey*, ___ U.S. ___, 113 L. Ed. 2d 68 (1991) (disputed practice occurred in January 1986); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (plaintiff fired in 1982); *Martin v. Wilks*, 490 U.S. 755 *reh'g denied*, 492 U.S. 932 (1989) (consent decree entered in 1981; suit filed in 1982); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (case filed in 1974); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plaintiff denied partnership in 1983); *Lorance v. AT&T Technologies Inc.*, 490 U.S. 900 (1989) (seniority system adopted in 1979; plaintiff laid off in 1982); *Library of Congress v. Shaw*, 478 U.S. 310 (1986) (Title VII complaints filed in 1976 and 1977).

Four of those cases were carried into their second decade when they were remanded for further proceedings.

If the Act applies only to conduct occurring on or after its effective date, November 21, 1991, then courts will be forced to construe the nuances of cases like *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) and *Martin v. Wilks*, 490 U.S. 755, *reh'g denied*, 492 U.S. 932 (1989), for many years, long after those cases have been repudiated by Congress. Victims of discrimination will continue to be denied the protections they were promised through the Act, and the central purpose of the Act will be frustrated. Indeed, for all practical purposes, if the Civil Rights Act of 1991 is not applied to pending cases, that Act will be transformed into the "Civil Rights Act of 2000" because of the time it will take for pending cases to be resolved under the antiquated pre-1991 rules. The language that the "Act shall take effect upon enactment," Civil Rights Act of 1991, § 402(a), would thereby be judicially rendered meaningless for thousands of aggrieved individuals. Nowhere in the volumes of legislative history for the 1991 Act did Congress evince an intent that the decisions expressly repudiated by the Act should live on in the federal courts until the next century.

II. If the Act is not Applied to Cases Pending at the Time of its Enactment, Hundreds, if not Thousands, of Individuals Will be Left Without A Remedy for Proven Discrimination.

The very real need for the Act to apply to cases pending at the time of its enactment can be seen in

a concrete examination of Section 101.⁴ The principal purpose of that section is to restore the protections and remedies against intentional racial and ethnic discrimination that were lost by many Americans as a result of this Court's narrow interpretation of 42 U.S.C. § 1981 in its decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).⁵ In *Patterson*, this Court, while expressly recognizing the United States' long-standing national policy and deep commitment to the eradication of discrimination, concluded that Section 1981 did not encompass claims for discrimination in employment when those claims arose from conduct after the formation of the employer-employee relationship. *Patterson*, 491 U.S. at 171. This Court concluded that the petitioner's claim could be brought only under Title VII, 42 U.S.C. § 2000e, and because it was not, petitioner, like many other claimants under Section 1981, was left without a remedy.

Congress' reaction to the Court's interpretation of Section 1981 was swift and unanimous.⁶ Both Houses

⁴ Section 101 of the Act contains no special clause discussing whether it is to be applied to cases pending at the time of the Act's enactment. Rather, by its plain language, it must be construed under the Act's general applicability clause. See, *infra*, pp. 15-19.

⁵ While both of the instant cases address issues concerning discrimination in employment, a thorough review of the jurisprudence of the 1991 Act must include an examination of other factors, such as Section 101's correction of *Patterson* and that case's interpretation of the laws concerning the making, execution, and termination of contracts. This necessity is underscored by the panoply of cases which continue to try to extend *Patterson* to non-employment settings. See, e.g., *Gersman v. Group Health Ass'n*, 975 F.2d 886 (D.C. Cir. 1992).

⁶ See, e.g., 137 Cong. Rec. S15383 (Daily ed. Oct. 28, 1991) (Sen.

of Congress and President Bush sought to correct the Court's interpretation because of the large number of victims left without a remedy in light of the *Patterson* ruling. During the debates preceding the enactment of the 1991 Act, Congress was made aware that there were hundreds of cases—involving thousands of victims of intentional discrimination—that were being dismissed pursuant to *Patterson*. The legislative history of the Act is replete with references to Congress' desire to act in the face of the many cases alleging intentional discrimination that were being dismissed. See 136 Cong. Rec. S9321 (Daily ed. July 10, 1990) (Statement of Sen. Kennedy) ("Already, the *Patterson* decision has caused the dismissal of more than 200 claims of race discrimination in the last year. It must be overruled by this Congress."); 136 Cong. Rec. S9336 (Daily ed. July 10, 1990) (Statement of Senator Hatch). The Bush Administration decided to support correcting *Patterson* based largely on the studies that had been submitted to Congress demonstrating the sheer volume of cases that had been dismissed.⁷

Even when President Bush vetoed the Civil Rights Act of 1990, he stated his support for correcting the *Patterson* decision. See 136 Cong. Rec. S16562 (Daily ed. Oct. 24, 1990). With the enactment of Section 101 of the 1991 Act, Congress completed its task of restoring remedies to victims of discrimination, who, like

Jeffords); 137 Cong. Rec. S15285 (Daily ed. Oct. 28, 1991) (Sen. Seymour); 137 Cong. Rec. S15483 (Daily ed. Oct. 30, 1991) (Danforth Interpretive Memorandum); 137 Cong. Rec. S15489 (Daily ed. Oct. 30, 1991) (Statement of Sen. Leahy).

⁷ See Statement of Donald B. Ayer, Deputy Attorney General, reprinted in Hearings on H.R. 4000, The Civil Rights Act of 1990, Volume 1, page 366 (Feb. 1990).

the petitioner in *Patterson*, otherwise were left with an empty right purporting to protect them from unlawful discrimination.

If this Court holds, however, that the Act does not apply to cases pending at the time of its enactment, Congress' action is largely frustrated. Mary Ann Vance is a representative of the many victims of unlawful discrimination left without a remedy after *Patterson*, if the 1991 Act is not applied to pending cases. In *Vance v. Southern Bell Tel. & Tel. Co.*, 863 F.2d 1503 (11th Cir. 1989), two different all-white juries, on two separate occasions, returned substantial verdicts for Vance, a black employee of Southern Bell. The first jury awarded Vance more than 3.5 million dollars in compensatory and punitive damages. On appeal, the Eleventh Circuit found sufficient evidence to support the determination of liability, but concluded that the damages were excessive.

Shortly after remand from the first appeal, this Court decided *Patterson*; however, the district court decided the case on remand under pre-*Patterson* law, and the second jury awarded Vance more than one million dollars. On appeal, the Eleventh Circuit applied *Patterson* retroactively to vacate the verdict, even though Congress had already enacted the 1991 Act repudiating *Patterson*. Thus, Vance, who demonstrably was the victim of unlawful discrimination in her employment, was deprived of her economic remedy calculated by a jury because of the Eleventh Circuit's application of *Patterson*, after *Patterson* was overruled by Congress.⁸

⁸ Title VII is not a realistic remedy for those individuals who sought redress for employment discrimination under Section 1981

Similarly, *Gersman v. Group Health Ass'n*, 975 F.2d 886 (D.C. Cir. 1992), illustrates the pitfalls of failing to apply the 1991 Act to pending cases. In that case, Alan Gersman and his company, Computer Security International ("CSI") brought suit under Section 1981 against Group Health Association ("GHA"), alleging that GHA had wrongfully terminated a contract with CSI because CSI's president was Jewish. The United States District Court for the District of Columbia held that *Patterson* barred a Section 1981 claim for discrimination in the performance of a contract, because that case limited the application of Section 1981 to the formation of a contract. The Court of Appeals affirmed that holding. Upon this Court's granting *certiorari*, *Gersman v. Group Health Ass'n*, — U.S. —, 112 S. Ct. 960 (1992), the case was vacated and remanded to the Court of Appeals, in light of the Civil Rights Act of 1991.

On remand, the District of Columbia Court of Appeals stood by its decision that *Patterson* controlled, and that the Act could not be applied to *Gersman*, a case pending at the time that the statute was enacted. Thus, Gersman and CSI remained the uncompensated victims of discrimination, based on a case—*Patterson*—which Congress repudiated months before the final court decision was rendered. Unless the 1991 Act is retroactively applied to pending cases, Vance, Gersman, and many other minority Americans will have no remedy for the undisputable wrongs perpetrated upon them.

because, in reliance on Section 1981 many did not file claims with the Equal Employment Opportunity Commission during the required time period. Therefore, those individuals would be left without any remedy at all if this Court concludes that Section 101 of the Act does not apply to pending cases.

III. If the Act is not Applied Retroactively, Federal Employees Will be Left Without a Real Remedy for the Discrimination They Have Suffered.

Another example of the crucial need for application of the Act to cases pending at the time of its enactment can be seen with regard to Section 102 of the 1991 Act. While that section does not create new substantive rights for federal employees, it does create new procedures and remedies for those workers.⁹ Section 102 provides public-sector employees with compensatory damages, pre-judgment interest, and the right to a jury trial. It is unconscionable that these remedies—which merely serve to bring federal employees more in line with their private-sector counterparts—should not apply to the thousands of federal workers whose claims are pending.

In fact, this Court recently reiterated its long-standing position concerning a court's ability to award rem-

⁹ African-Americans have long represented a greater percentage of federal executive branch employment than private employment. African-Americans represent 16.6% of executive branch government employees, while they represent merely 12.1% of the national population. 1992 *Statistical Abstract of the United States*, 112th ed. This has generally been thought to be due to the desire for enhanced security in employment. See, e.g., *Bowman, Public Policy: "We Don't Want Anybody Anybody Sent": The Death of Patronage Hiring in Chicago*, 86 NW. U. L. REV. 57, 82 (1991) (discussing African-Americans and "government jobs which are valued for their security.") Yet, the federal government has been rife with discrimination, and there are literally dozens of cases in which the federal government has been found to discriminate. See, e.g., *Turner v. Barr*, 806 F. Supp. 1025 (D.D.C. 1992), *reh'g denied* 811 F. Supp. 1 (1993); *Timus v. Secretary of Labor*, 782 F. Supp. 122 (D.D.C. 1991); *Coleman-Santucci v. Secretary, U.S. Dept. of Health and Human Servs.*, 754 F. Supp. 209 (D.D.C. 1991).

edies, including damages, when a statute has been violated. Last term, this Court held:

[W]here legal rights have been invaded, and a federal statute provides a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.

Franklin v. Gwinnett County Pub. Schools, — U.S. —, 112 S. Ct. 1028, 1033 (1992), quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946). Relying on this long-lived standard, which this Court traced back to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), this Court concluded:

The general rule, therefore, is that absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute.

Franklin, 112 S. Ct. at 1035.

The Civil Rights Act of 1991 presents precisely the sort of legislation contemplated by *Franklin*. The Act provides a “general right to sue” for violations of legal rights. In fact, the 1991 Act provides “clear direction” that a Court *should* award appropriate relief to civil rights plaintiffs. Thus, under this Court’s own recently reiterated precedent, the remedial provisions of the Civil Rights Act of 1991 should be applied to cases pending at the time of enactment.¹⁰

¹⁰ Lest employers argue that retroactive application of the Act would submit them to undue hardship, Congress reflected its would submit them to undue hardship, Congress reflected its concern for

IV. The Statutory Language and Scheme of the 1991 Act Demonstrate that Congress Intended that the Act be Applied Retroactively.

The appropriateness of applying the 1991 Act to pending cases is confirmed by the plain language of the Act. Section 402, entitled “Effective Date,” unambiguously provides in subsection (a):

Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment.

Civil Rights Act of 1991, § 402(a). This plain instruction to apply the Act immediately upon enactment to pending matters as well as future conduct is confirmed by the over-arching statutory scheme.

Consistent with the command of Section 402(a), certain provisions of the Act are expressly not retroactive. Section 109, which concerns the protection of American citizens employed abroad by American companies, expressly provides:

[T]he amendments made by this section shall not apply with respect to conduct occurring before the date of the enactment of this Act.

costs to discriminating employers by capping the damages that are available under Section 102 of the Act. This cap shows a careful and deliberate effort to balance the equities between full vindication of an employee’s existing rights and the concerns of employers. The legislative debates are replete with references regarding the inadequacy of the remedial scheme of Title VII as it previously existed, and no one suggested that only future victims of discrimination deserve adequate remedies. See 137 Cong. Rec. S15338 (Daily ed. Oct. 29, 1991) (Sen. DeConcini); 137 Cong. Rec. S15383 (Daily ed. Oct. 29, 1991) (Sen. Jeffords); 137 Cong. Rec. S15392 (Daily ed. Oct. 29, 1991) (Sen. Daschle); 137 Cong. Rec. S15482 (Daily ed. Oct. 30, 1991) (Sen. Gore).

Section 109(c). This subsection would be mere surplus verbiage if the plain language of Section 402(a) of the Act is not given effect.

Similarly, Section 402(b) excludes from the entire Act certain disparate impact cases commenced and decided before the Act was enacted, providing:

Notwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983.

Civil Rights Act of 1991, § 402(b). Thus, section 402(b) exempts from the retroactive application of the Act a narrowly defined class of cases. If the Act were not intended generally to have retroactive application, Section 402(b), like Section 109(c), would be wholly superfluous.

Any argument that the 1991 Act applies to prospective conduct or cases only necessarily negates the plain language and effect of Sections 109(c), 402(a) and 402(b), and disregards the fundamental principle of statutory construction forbidding interpretations that would render any provisions of an act a nullity. See *Kungys v. United States*, 485 U.S. 759, 778 (1988) (J. Scalia) ("the cardinal rule of statutory interpretation [is] that no provision should be construed to be entirely redundant"). The only interpretation of the 1991 Act that gives effect to *all* the words and clauses enacted by Congress, is that the Act is to be applied to all pending cases except where the Act expressly provides otherwise. Significantly, this inter-

pretation of the Act as a whole also gives effect to the plain language of Section 402(a).

In contrast to Congress' express exceptions from immediate application, several provisions of the Act clearly require retroactive application of the Act. Section 101's correction of *Patterson* and Section 102's closing of several remedial loopholes for federal employees both indicate by their plain language that they apply to pending cases. Construing either of these sections to apply only to cases after the Act's enactment would rule out thousands of cases, permitting the perpetuation of unlawful discrimination. Absent a special retroactivity provision like Section 109(c) or Section 402(b), Section 101 and 102 can only function properly under the Act's general retroactivity provision, Section 402(a).

Section 108 of the Act responds to *Martin v. Wilks*, 490 U.S. 755, *reh'g denied*, 492 U.S. 932 (1989), by limiting challenges to litigated and consent judgments and orders resolving employment discrimination claims where the challenging party had sufficient notice and an opportunity to be heard, "prior to the entry of the judgment or order." This section clearly is worded so as to protect existing as well as future judgments and orders where the statutory conditions are met—obviously protecting conduct that occurred prior to the enactment of the Act. Construing the Act as prospective would leave existing consent decrees and orders open to challenge in perpetuity, keeping *Martin v. Wilks* alive. Like Sections 101 and 102, Section 108 does not contain any special retroactivity provisions, but can only function properly under the general retroactivity of the statute pursuant to Section 402(a).

Section 112 restores the right to challenge existing discriminatory seniority systems adopted long ago, as long as the charging party becomes subject to the system or is affected by it within the period of limitations. Again, unless the statute applies to pending cases and conduct, Section 112 would be rendered largely meaningless and *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989), which limited such challenges, would live on. Like Sections 101, 102, and 108, Section 112 contains no special rule providing for immediate application but presumes through Section 402(a) application to conduct occurring before the date of enactment.

Section 113 of the Act allows the award of expert fees in Title VII actions and "in any action" or proceeding under 42 U.S.C. § 1981 or the new Section 1981A. It would be extraordinary to read this broadly-worded provision as not allowing future awards of expert fees in cases filed before November 21, 1991, or not allowing awards for the part of the expert's services that were performed before that date. As this Court recognized in *Ex Parte Collett*, 337 U.S. 55, 58 (1949), the reach of language such as "in any action" is unmistakably long. Thus, as with the other provisions noted above, this section assumes a general rule of retroactivity under Section 402(a).

Section 114 of the Act governs cases against federal agencies under Section 717 of the Civil Rights act of 1964, as amended, 42 U.S.C. § 2000e-16, and overrules *Library of Congress v. Shaw*, 478 U.S. 310 (1986), by providing that "the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties." Where the central purpose of Congress is to provide compensation for

delay in payment, it would be an unusual construction that a future award of interest cannot compensate for delay occurring before November 21, 1991. Section 114 contains no special provision requiring retroactive application to pending cases and conduct; it too functions under the general rule of retroactivity in Section 402(a).

Finally, Section 115 of the Act changes the statute of limitations period for claims brought pursuant to the Age Discrimination in Employment Act, 29 U.S.C. § 621 ("ADEA"), to ninety days from receipt of the Equal Employment Opportunity Commission's ("EEOC") termination notice. The undisputed purpose of this amendment was to "avoid[] the problems created by current law" 137 Cong. Rec. H9548 (Daily ed. Nov. 7, 1991). As with the procedural amendment of Section 113, it would be incongruous to interpret Section 115 to perpetuate the problems that had been caused by the ADEA's former statute of limitations. Section 115, like the other sections containing no explicit retroactive provision must be deemed to apply to cases pending at the time of its enactment.

Thus, the statutory scheme of the Act reinforces the clear congressional mandate in Section 402(a) that provides a general rule of retroactive application to pending cases, unless otherwise specifically provided by the Act. No provisions are written in a manner which assumes a contrary reading of Section 402(a). Immediate application offers the only interpretation that would provide coherence and meaning to the statute as a whole.

V. This Court has Held Other Civil Rights Statutes Applicable to Pending Cases.

The application of the Civil Rights Act of 1991 to cases pending at the time of its enactment follows a long course of tradition with regard to the retroactivity of civil rights statutes.

A. The 1960 Civil Rights Act Was Applied to Pending Cases.

Significantly, more than three decades ago, this Court held the Civil Rights Act of 1960 applicable to pending cases. In *United States v. Alabama*, 362 U.S. 602 (1960), an action had been brought against the State of Alabama for alleged racially discriminatory conduct by the Board of Registrars of Macon County, Alabama. The action was dismissed by the District Court on the grounds that, *inter alia*, the state was not a "person" subject to suit under the Civil Rights Act of 1957. The District Court's ruling was affirmed by the Court of Appeals. *United States v. Alabama*, 267 F.2d 808 (5th Cir. 1959). By the time the case was heard by this Court, however, the Civil Rights Act of 1960—which expressly authorized such actions—had been passed by Congress. Four days after the matter was heard by this Court, the 1960 Act was signed by the President.¹¹ This Court, ten days later, vacated the judgments of the District Court and the Court of Appeals and remanded the action, explaining:

¹¹ *United States v. Alabama* was heard by this Court on May 2, 1960. The Civil Rights Act of 1960 was signed by the President on May 6, 1960. This Court decided *United States v. Alabama* on May 16, 1960. 362 U.S. at 602, 604.

Under familiar principles, *the case must be decided on the basis of law now controlling*, and the provisions [of the Civil Rights Act of 1960 authorizing such actions] are applicable to this litigation. . . . [B]y virtue of the provisions of that section the District Court has jurisdiction to entertain this action against the State.

United States v. Alabama, 362 U.S. at 604 (emphasis added) (citations omitted). The same rule should control the current incarnation of civil rights law—the Civil Rights Act of 1991 should apply to cases pending at the time of its enactment.

B. The 1972 Amendments to the Civil Rights Act Were Applied to Pending Cases.

Following this Court's lead in *United States v. Alabama*, numerous courts have held remedial civil rights statutes to be retroactive because of their procedural nature. The issue again arose with regard to the 1972 Amendments to the Civil Rights Act of 1964, upon the passage of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, (the "1972 Amendments"). Title VII of the Civil Rights Act of 1964 forbade employment discrimination on the basis of race, color, religion, sex, or national origin; however, until enactment of the 1972 Amendments, Title VII did not provide federal employees with access to the federal courts to protect those rights.¹²

The issue of whether the 1972 Amendments applied to actions pending administratively on the effective

¹² The 1972 amendments expressly provided federal employees with a remedy in federal district court upon exhaustion of their administrative remedies. See 42 U.S.C. § 2000e-16(c) (1992).

date of the act was addressed by the Court of Appeals for the Fourth Circuit in *Koger v. Ball*, 497 F.2d 702 (4th Cir. 1974). Holding that the 1972 Amendments applied to cases pending at the time of enactment, the court explained:

The legislative history establishes that the 1972 Act did not create a new substantive right for federal employees. The constitution, statutes, and executive orders previously granted them the right to work without racial discrimination. Section 717(c) simply created a new remedy for the enforcement of this existing right.

* * * *

Procedural statutes that affect remedies are generally applicable to cases pending at the time of enactment. Of course, retrospective application is not allowed when it will work a manifest injustice by destroying a vested right. But this exception plays no role here because the government has no vested right to discriminate against its employees on the basis of race.

497 F.2d at 705-706 (emphasis added) (citations omitted).

Other circuits soon adopted the holding and rationale of *Koger*. In *Womack v. Lynn*, 504 F.2d 267, 269 (D.C. Cir. 1974), the District of Columbia Circuit expressly adopted the reasoning of *Koger* and held that the statute was remedial and applied retroactively to pending cases. In *Sperling v. United States*, 515 F.2d 465 (3d Cir. 1975), the Third Circuit expressly agreed with the reasoning of *Koger* and held that the amend-

ments were "a classic example of a procedural or remedial statute applicable to cases pending at the time of enactment." 515 F.2d at 473 (footnote omitted). In *Adams v. Brinegar*, 521 F.2d 129, 130 (7th Cir. 1975), the Seventh Circuit cited *Koger* and concluded that "Congress, in enacting the 1972 Amendments, was merely providing an additional remedy to enforce a preexisting right."

In *Brown v. General Servs. Admin.*, 507 F.2d 1300 (2d Cir. 1974), *aff'd*, 425 U.S. 820 (1976), the Second Circuit analyzed arguments in favor of the retroactive application of the 1972 Amendments, and the arguments against. The Second Circuit concluded: "So far as the statutory language and relevant legislative history are concerned, retroactive application . . . would appear to be appropriate . . . [and] [i]n view of the policy of the federal government against discrimination in federal employment . . . such retroactive application of the statute appears sound." 507 F.2d at 1306. On appeal, this Court expressly recognized the Second Circuit's holding that the 1972 Amendments applied retroactively to pending cases and noted: "The parties have apparently acquiesced in this holding by the Court of Appeals, and we have no occasion to disturb it." *Brown v. General Servs. Admin.*, 425 U.S. 820, 824 n.4.

In fact, the only circuit to hold that the 1972 Amendments were not applicable to pending actions was the Sixth Circuit. In *Place v. Weinberger*, 497 F.2d 412 (6th Cir. 1974), the Sixth Circuit held that the provisions of the 1972 Amendments which were silent on the issue of retroactivity must be held to

be prospective only.¹³ The Sixth Circuit's ruling however, was vacated by this Court with express reference to footnote four in *Brown v. General Servs. Admin.*, ordering:

[Petition for writ of] [c]ertiorari granted, judgment vacated and case remanded to the Court of Appeals for the Sixth Circuit for further consideration in light of *Brown v. General Services Administration*, 425 U.S. 820, 824 n.4 (1976).

Place v. Weinberger, 426 U.S. 932 (1976). Thus, this Court once again recognized the special application of civil rights legislation to cases pending at the time of its enactment.

VI. Legislation Providing Procedural and Remedial Changes Traditionally Applies to Pending Cases.

A. Procedural and Remedial Statutes are Traditionally Held to Apply to Cases Pending at the Time of Their Enactment.

Even beyond the area of civil rights legislation, this Court has repeatedly held that statutes enacting procedural and remedial measures apply to cases pending

¹³ Even applying the Sixth Circuit's analysis of the 1972 Amendments to the 1991 Act, the 1991 Act should be held retroactive. In *Place v. Weinberger*, the Sixth Circuit concluded that Congress' express provision in the act for Sections 11 and 14 to be retroactive to pending claims coupled with Congress' silence on the other sections indicated that those other sections should have prospective application only. 497 F.2d at 414. In the 1991 Act, by contrast, Congress expressly provided that Sections 109(c) and 402(b) will have only prospective application. Thus, even by the Sixth Circuit's logic in *Place*, Congress' silence as to the remaining sections of the 1991 Act indicates that such sections should have retroactive application.

at the time of enactment. Over one and a half centuries ago, this Court wrote:

[C]onsidering the act of 1830 as providing a remedy only, it is entirely unexceptionable. It has been repeatedly decided by this court, that the retrospective operation of such a law forms no objection to it. Almost every law, providing a new remedy, affects and operates upon causes of action existing at the time the law is passed.

Sampeyreac v. United States, 32 U.S. 222, 239 (1833). This conclusion is based, at least in part, on the theory that "[n]o one has a vested right in any given mode of procedure . . ." *Crane v. Hahlo*, 258 U.S. 142, 147 (1922).

This reasoning has been followed through the decades. In *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 464-65 (1921), this Court held that injunctive relief, made available because of the enactment of Section 1 of the Clayton Act, applied to cases pending at the time the law was enacted. In *Ex Parte Collett*, 337 U.S. 55, 71 (1949), this Court held that the previously unavailable doctrine of *forum non conveniens*, made available by the enactment of the 1948 revisions to the Judicial Code, applied to cases pending at the time the act became effective. In *Denver & Rio Grande Western Railroad Co. v. Brotherhood of Railroad Trainmen*, 387 U.S. 556, 563 (1967), this Court held the 1966 amendment to the general venue provisions of 28 U.S.C. § 1391(b) applied to pending cases, explaining "[t]his amendment does not change the substantive law applicable to this lawsuit. It is wholly procedural . . . As this Court said in applying

28 U.S.C. § 1404(a) to pending actions, 'No one has a vested right in any given mode of procedure.' " (citation omitted).

Like the statutes involved in those cases, the 1991 Act creates no new or different rights for victims of discrimination. It is well-recognized that the right to be free from unlawful discrimination in employment existed long before the enactment of the 1991 Act. Moreover, Congress expressly declared the elimination of discrimination to be the policy of this country as long ago as 1866 when the first civil rights statute was passed in the wake of the Civil War. Thus, the 1991 Act was enacted to protect further those longstanding rights, altering the remedies and procedures available to insure that employees are free from unlawful discrimination.

B. The Civil Rights Act of 1991 is a Procedural and Remedial Statute.

The 1991 Act, on its face, provides procedural and remedial measures to combat unlawful discrimination. The starting point for interpretation of any statute is the law's plain language. *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The Civil Rights Act of 1991 is no exception. The plain language of the Act demonstrates the statute's remedial purpose and effect. Section 2 of the Act, entitled "Findings," specifically provides in relevant part:

The Congress finds that—

- (1) *additional remedies* under federal law are needed to deter unlawful harassment and intentional discrimination in the workplace;

Civil Rights Act of 1991, § 2 (emphasis added). Similarly, Section 3 of the Act, entitled "Purposes," provides in relevant part:

The purposes of this Act are—

- (1) to provide *appropriate remedies* . . .
- (2) to *codify* the concepts of 'business necessity' and 'job related' . . .
- (3) to *confirm* statutory authority . . .

Civil Rights Act of 1991, § 3 (emphasis added). Thus, it is plain from the language of the statute itself that Congress did not set out to enact legislation creating new rights for employees or to make unlawful previously lawful conduct.

The specific provisions of the 1991 Act further confirm the remedial purpose of this legislation. Title I of the Act is entitled pointedly: "Federal Civil Rights Remedies." Section 102 provides for and regulates the award of damages and the availability of jury trials. Section 103 provides for the recovery of attorneys fees. Section 105 codifies burdens of persuasion and proof in disparate impact actions. Section 113 provides for the recovery of expert fees. Section 114 provides for the recovery of interest and the extension of the limitations period. There can be no debate that such remedial provisions should be held to apply retroactively. *See, e.g., Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167 (5th Cir. 1990) (holding burden of proof to be remedial for purposes of retroactivity.)

None of these provisions creates new substantive rights for employees. None makes unlawful otherwise lawful conduct by employers in their employment

practices. None diminishes or destroys vested rights of employers. Instead, the provisions of the Act modify the procedures and remedies available to employees in actions to enforce their pre-existing right to be free from unlawful discrimination.

C. The Distinction Between Procedural and Substantive Amendments Reconciles the Apparently Competing Precedent in this Court in *Bradley* and *Bowen*.

The distinction between legislative changes which are procedural and those which are substantive reconciles two lines of precedent in this Court termed in "tension" and in "conflict" with one another. *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990). Those two branches of decisions are represented on the one hand by *Bradley v. School Bd. of Richmond*, 416 U.S. 696 (1974), in which this Court applied a new law to pending cases, and *Bowen v. Georgetown University Hosp.*, 488 U.S. 204 (1988), in which this Court declined to so apply a new law.

In *Bradley v. School Bd. of Richmond*, this Court considered the Emergency School Aid Act, 20 U.S.C. § 1617, which was promulgated as part of the Education Amendments of 1972, permitting the recovery of expenses and attorneys' fees for services rendered in a school desegregation case. This Court concluded that the Amendments should be applied retroactively, and that the petitioners should be entitled to recover expenses and attorneys' fees incurred in the pursuit of their claim. Clearly, under the procedural and substantive classification system, expenses and attorneys' fees are remedial measures. *See supra* at p. 24-26. Moreover, any statute which legislates such remedies must be considered procedural. Thus, *Bradley* could have

been decided identically under the procedural and remedial analysis illuminated above.

By contrast, *Bowen v. Georgetown University Hosp.* involved the application of the Medicare Act, 42 U.S.C. § 1395x(v)(1)(A). Under that statute, seven hospitals were required to repay over two million dollars to the federal government several years after the money had been paid out to the hospitals as Medicare reimbursement payments, in accordance with a reimbursement schedule that had a retroactive reach of three years. This Court concluded, without reference to *Bradley*, that such payments would be inappropriate. When viewed under the procedural and remedial distinction set forth above, the millions of dollars received by the hospitals as reimbursements plainly were seen by the majority in *Bowen* to have become vested and thus constituted a substantive right. The repayment of that sum was a substantive amendment to the hospitals' rights. As such, the reimbursement schedule could not be applied retroactively.¹⁴ Thus, if this Court should hold the 1991 Act to apply to cases pending at the time of its enactment, it can reconcile the "apparent tension" between the *Bradley* and *Bowen* lines of cases.

CONCLUSION

Given this Court's long history of applying civil rights statutes to cases pending at the time of their enactment, and given the plain language of the Civil

¹⁴ The procedural and substantive distinction need not be applied to determine the retroactivity of a statute which states clearly on its face, as does the Civil Rights Act of 1991, whether it is to be applied retroactively. *See, e.g., Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990).

Rights Act of 1991, the Act should apply immediately. If such application is not made, untold thousands will suffer the unjust dismissal of their claims and the inability to obtain any remedy for unlawful conduct by discriminating employers. Moreover, the judicial system will be clogged with cases that must be decided under long-repudiated law, and valuable judicial resources will be wasted for years to come. The Civil Rights Act of 1991 should be applied to cases pending at the time of its enactment.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

BARBARA LANDGRAF,
v. *Petitioner,*

USI FILM PRODUCTS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Fifth Circuit

MAURICE RIVERS AND ROBERT C. DAVISON,
v. *Petitioners,*

ROADWAY EXPRESS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit

BRIEF OF THE NATIONAL WOMEN'S LAW CENTER,
THE WOMEN'S LEGAL DEFENSE FUND,

(Additional *Amici* Listed on Inside Cover)

AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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WOMEN'S LAW PROJECT, AND
YWCA OF THE U.S.A.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-757

BARBARA LANDGRAF,
v. *Petitioner,*

USI FILM PRODUCTS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Fifth Circuit

No. 92-938

MAURICE RIVERS AND ROBERT C. DAVISON,
v. *Petitioners,*

ROADWAY EXPRESS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit

BRIEF OF THE NATIONAL WOMEN'S LAW CENTER,
THE WOMEN'S LEGAL DEFENSE FUND,
AMERICAN ASSOCIATION OF UNIVERSITY WOMEN,
AMERICAN ASSOCIATION OF UNIVERSITY WOMEN
LEGAL ADVOCACY FUND,
AMERICAN CIVIL LIBERTIES UNION,
AMERICANS FOR DEMOCRATIC ACTION,
CALIFORNIA WOMEN'S LAW CENTER,
CENTER FOR WOMEN POLICY STUDIES,
COALITION OF LABOR UNION WOMEN,
EQUAL RIGHTS ADVOCATES, INC.,
FEDERALLY EMPLOYED WOMEN, INC.,
FEMINIST MAJORITY FOUNDATION,
JAPANESE AMERICAN CITIZENS LEAGUE,
NATIONAL COMMITTEE ON PAY EQUITY,
NATIONAL COUNCIL OF JEWISH WOMEN,

NATIONAL COUNCIL OF NEGRO WOMEN, INC.,
 NATIONAL ORGANIZATION FOR WOMEN,
 NOW LEGAL DEFENSE AND EDUCATION FUND,
 NATIONAL WOMEN'S CONFERENCE COMMITTEE,
 NATIONAL WOMEN'S PARTY,
 NORTHWEST WOMEN'S LAW CENTER,
 PEOPLE FOR THE AMERICAN WAY,
 U.S. SECTION OF THE WOMEN'S INTERNATIONAL
 LEAGUE FOR PEACE & FREEDOM,
 WOMEN EMPLOYED,
 WOMEN'S LAW PROJECT, AND
 YWCA OF THE U.S.A.
 AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

Amici curiae are 26 women's rights, civil rights, civil liberties, religious, and labor organizations that share a strong commitment to the eradication of all forms of discrimination in the workplace, including sexual and racial harassment. A number of the *amici* were substantially involved in presenting evidence to Congress of the need for the remedial legislation that became the Civil Rights Act of 1991, and all of the *amici* desire to present their perspective on these two extremely important cases.¹

Congress passed the Civil Rights Act of 1991 in order to restore and strengthen federal civil rights protections, particularly as they pertain to discrimination in employment. The issue presented here is whether that statute applies to cases pending at the time of enactment. This Brief will not restate the analysis of the statute and its legislative history presented by the petitioners. Rather, it will focus upon the special concerns of Congress in addressing the evils of invidious discrimination in the work-

¹ The petitioners and respondents in both cases have consented to the filing of this Brief, and copies of the parties' consent letters have been filed with the Clerk. Appended to this Brief are statements of the individual organizations that have joined as *amici curiae*.

place, particularly the sexual harassment of working women, and upon the determination of Congress to ensure that adequate and effective remedies are available to all victims of such intentional discrimination.

SUMMARY OF ARGUMENT

The Civil Rights Act of 1991 ("the Act" or "the 1991 Act"), Pub. L. No. 102-166, 105 Stat. 1071, was passed by an overwhelming bipartisan majority of Congress, and signed into law by President Bush on November 21, 1991.² As confirmed by the congressional statements of findings and purpose and by the statute's legislative history, the Act was a remedial measure designed to close certain significant gaps in two principal civil rights laws, Title VII of the Civil Rights Act of 1964 ("Title VII") and 42 U.S.C. § 1981 ("Section 1981").

In particular, the Act was intended to ensure that adequate remedies are available to compensate victims of invidious discrimination in the workplace. As Congress found, the subjection of employees to sexual, racial and/or other similar forms of harassment is a pervasive problem in our society, one that causes significant psychological, financial and often physical harm to its victims, as well as a loss of worker-productivity. Congress also found that, while such intentional discrimination is plainly proscribed by Title VII, the pre-Act unavailability of compensatory and punitive damages under Title VII often left victims of harassment without any effective remedy for the violation of their right to work in an environment free of such conduct. And although victims of racial harassment and other racially discriminatory employment conditions had previously been able to obtain compensation under Section 1981 for such intentional wrongdoing, this avenue of relief was foreclosed by the decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

² The Act was passed in the Senate and the House by votes of 93-5 and 381-38, respectively. *Congressional Quarterly Almanac*, Vol. XLVII, 31-S and 94-H (1991).

In order to rectify this situation, the Civil Rights Act of 1991 provides for compensatory and punitive damages (within certain monetary limits) for the intentional violation of Title VII, and amends Section 1981 to make clear that the latter statute prohibits, *inter alia*, discrimination on the basis of race in all aspects of an employment relationship. The Act expressly states (in Section 402(a)) that "[e]xcept as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment."

The sole issue presented in the instant cases is whether the Act applies to cases pending on its date of enactment. *Amici* respectfully submit that this question is answered in the affirmative by the plain language of Section 402(a), for the reasons set forth by the Ninth Circuit in *Reynolds v. Martin*, 985 F.2d 470 (9th Cir. 1993), and that this Court's inquiry should end there. *Amici* further submit, for the reasons discussed below, that the same conclusion is also required by long-standing judicial authority that permits—indeed obligates—the federal courts to provide an adequate remedy for the violation of federally-protected rights, absent an explicit prohibition of the remedy by Congress. *See, e.g., Franklin v. Gwinnett County Pub. Schools*, 112 S. Ct. 1028 (1992); *Bell v. Hood*, 327 U.S. 678 (1946). In this case, not only does no such limitation of remedies exist, but the Act demonstrates the intent of Congress that all necessary remedies be available to rectify intentional discrimination in the workplace. For these reasons, there is no need for this Court to engage in traditional "retroactivity" analysis. However, even assuming, *arguendo*, the relevance of such analysis, precedent of this Court compels the conclusion that the Civil Rights Act of 1991 applies to pending cases. *See, e.g., Bradley v. School Bd. of City of Richmond*, 416 U.S. 696 (1974).

A contrary holding would continue to subject a plaintiff such as petitioner Barbara Landgraf to the situation in which a federal court found that she had "suffered significant sexual harassment," *Landgraf v. USI Film*

Products, 968 F.2d 427, 429 (5th Cir. 1992), but no remedy was available for that egregious and intentional violation of federal law. Congress appropriately has determined that this situation is intolerable in a society that is striving for equality of treatment in the workplace, and there is no justifiable basis upon which that situation should be perpetuated by this Court.

ARGUMENT

I. THE CIVIL RIGHTS ACT OF 1991 WAS SPECIFICALLY INTENDED TO PROVIDE ADEQUATE REMEDIES TO VICTIMS OF SEXUAL HARASSMENT AND OTHER FORMS OF INTENTIONAL DISCRIMINATION IN EMPLOYMENT

The Civil Rights Act of 1991 contains two significant remedial measures regarding invidious discrimination in employment. In Section 102 (codified at 42 U.S.C. § 1981a), the Act provides compensatory and punitive damages for the intentional violation of Title VII. And in Section 101 (which amends Section 1981 to make clear, in light of *Patterson v. McLean Credit Union*, 491 U.S. 164 (1969), that the statute prohibits race discrimination in all aspects of an employment relationship), the Act effectively restores the availability of the remedies of Section 1981 to victims of discriminatory conduct that continued to be unlawful under Title VII after *Patterson*.

In each instance, Congress was responding to overwhelming evidence that the remedies available in cases of intentional discrimination in employment were inadequate to redress the injuries caused by such discrimination. As an examination of the evidence presented to Congress demonstrates, these remedial deficiencies became most apparent to Congress in cases of sexual harassment, a form of discrimination that typically results in non-wage injuries that could not adequately be remedied by the equitable relief to which the courts had been limited under Title VII. Although the remedial issues considered by Congress certainly involved cases of

discrimination other than harassment, Congress found the inequities caused by the failure of existing remedies in harassment cases to be particularly persuasive of the need to expand those remedies. A review of the legislative record demonstrates that passage of the 1991 Civil Rights Act was driven in pertinent part by the response of Congress to such cases and its consequent determination to ensure the availability of adequate remedies to all victims of intentional discrimination in employment.

A. Title VII And Section 1981 As Previously Interpreted Were Inadequate To Redress Sexual Harassment And Other Forms Of Invidious Discrimination In Employment

The subjection of female workers to sexual harassment pervades our society; studies have shown that approximately 50% to 80% of women have experienced sexual harassment on the job. Matthew C. Hesse & Lester J. Hubble, Note, *The Dehumanizing Puzzle of Sexual Harassment: A Survey of the Law Concerning Harassment of Women in the Workplace*, 24 Washburn L.J. 574 (1985) (hereafter "*Dehumanizing Puzzle*"), at 575.³ The great harms caused by sexual harassment—to the employers as well as to the victims—cannot be overem-

³ Between 1980 and 1988, more than 38,500 sexual harassment cases were filed with the EEOC. See H.R. Rep. No. 644 Part 1, 101st Cong., 2d Sess. 40 n.29 (1990). This figure surely underrepresents the number of actual incidents; according to Women Employed, a Chicago-based organization that has advised and assisted thousands of women with employment discrimination problems, "approximately 80 percent [of the women whom they counsel] choose not to file discrimination charges, primarily because it just does not seem worth it." *The Civil Rights Act of 1990: Joint Hearings on H.R. 4000 Before the Comm. on Education and Labor and the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 2d Sess., Vol. 2 at 19 (1990) (statement of Nancy Kreiter). The problem is not confined to the private sector; according to a 1988 U.S. Merit Systems Protection Board survey, 42% of women working for the federal government reported that they had experienced sexual harassment in the two years prior to the survey. See H.R. Rep. No. 644 Part 1, 101st Cong., 2d Sess. 40 n.29 (1990).

phasized. A recent survey of 160 "Fortune 500" companies, for example, showed an average company loss of \$6.7 million per year in decreased productivity, increased absenteeism and higher employee turnover caused by sexual harassment. James G. Frierson, *Sexual Harassment in the Workplace Costly in Production, Absenteeism, Turnover*, 8 Preventive L. Rep. 3, at 3 (June 1989). Victims of harassment experience personal degradation and humiliation, anxiety, stress, nervousness, depression, and loss of self-esteem, and suffer physical problems such as nausea, insomnia, headaches, loss of appetite and high blood pressure. See Sharon T. Bradford, *Relief for Hostile Work Environment Discrimination: Restoring Title VII's Remedial Powers*, 99 Yale L.J. 1611 (1990) (hereafter "Bradford"), at 1615; *Dehumanizing Puzzle*, *supra*, at 575 & n.9; and cases discussed *infra* pp. 10-16.

Nonetheless, despite the very real and tangible injuries caused by harassment, the civil rights laws have proven inadequate to remedy those injuries. Historically, Title VII has been interpreted by the courts as providing only equitable relief (e.g., injunctions, back pay and reinstatement) but not legal relief (e.g., compensatory and punitive damages) to remedy a violation. See, e.g., *Curran v. Portland Superintending Sch. Comm.*, 435 F. Supp. 1063, 1078 (D. Me. 1977).⁴ While so-called "equitable" relief generally has been sufficient to remedy the wage-related consequences of discrimination, it has

⁴ The view that compensatory and punitive damages were not available under Title VII (§ 706(g), 42 U.S.C. § 2000e-5(g)) was not universal, however. See, e.g., *Humphrey v. Southwestern Portland Cement Co.*, 369 F. Supp. 832 (W.D. Tex. 1973) (compensatory damages available), *rev'd on other grounds*, 488 F.2d 691 (5th Cir. 1974); *Tooles v. Kellogg Co.*, 336 F. Supp. 14 (D. Neb. 1972) (punitive damages may be available). See also Bradford, *supra*; Michael J. Goldberg, Comment, *Implying Punitive Damages in Employment Discrimination Cases*, 9 Harv. Civ. R.-Civ. Lib. L. Rev. 325, 330-34 (1974). Since the 1991 Civil Rights Act (42 U.S.C. § 1981a) expressly provides for damages in Title VII cases, the issue of whether Title VII previously should have been interpreted to include legal relief is now, of course, academic.

proven inadequate to deal with the consequences of invidious harassment and other non-wage-related injuries. The unavailability of compensatory and punitive damages under Title VII has left the victims of sexual harassment with no remedy at all for the types of non-wage injuries caused by such discrimination. *See generally* Comment, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 Harv. L. Rev. 1449, 1464-65 (1984); Bradford, *supra*, at 1613-19. This unavailability of adequate remedies was described by Senator Kennedy, a principal sponsor of the 1991 Civil Rights Act, as "one of the most serious loopholes in existing law." 137 Cong. Rec. S15234 (daily ed. Oct. 25, 1991). *Accord* 137 Cong. Rec. S15490 (daily ed. Oct. 30, 1991) (statement of Sen. Durenberger terming the inadequacies of Title VII's remedies a "gigantic loophole in our discrimination laws").

The sexual harassment case at bar epitomizes the inadequacy of the equitable remedies to which Title VII plaintiffs have been restricted. Barbara Landgraf, a machine operator at a production plant, was subjected at work to "continuous and repeated inappropriate verbal comments and physical contact," as the trial court determined and as the respondents herein did not dispute at trial. *Landgraf*, 968 F.2d at 429, 432. Ms. Landgraf resigned and sued her employer under Title VII. However, because the trial court concluded that the resignation was not itself the result of discrimination, Ms. Landgraf received no equitable relief (such as back pay). *Id.* at 429-32. And even though Ms. Landgraf was the adjudicated victim of an intentional and undisputed violation of Title VII, she received no compensation for the humiliation and suffering caused by that violation—the harassment itself.

Barbara Landgraf's plight has been all too common. As Congress learned in considering the legislation that became the 1991 Civil Rights Act, *see infra* pp. 10-16, the unavailability of an adequate remedy for sexual harassment under Title VII created a class of persons whose

federal rights unquestionably had been violated but who could not obtain adequate relief for that violation. Employees who were subjected to a similar evil—racial harassment—fared no better under Title VII. *See, e.g., Williams v. Atchison, Topeka & Santa Fe Ry.*, 627 F. Supp. 752 (W.D. Mo. 1986) (African American male employee who was forced to endure racial slurs and "jokes" such as posting of Ku Klux Klan application on company bulletin board received judgment that employer had violated Title VII but was awarded no damages under Title VII for his resulting emotional and psychological problems, a situation the court "regretted").

Section 1981 historically has offered more expansive remedies to victims of race discrimination than has Title VII, including compensatory and punitive damages. *See, e.g., Johnson v. Railway Express Agency*, 421 U.S. 454, 460 (1975). *See also The Civil Rights Act of 1990: Hearing on S. 2104 Before the Senate Comm. on Labor and Human Resources*, 101st Cong., 2d Sess. (1990) (hereafter "*Civil Rights Act 1990 Senate Hearing*"), at 160-65 (statement of Prof. Eleanor Holmes Norton). However, this Court's decision in *Patterson v. McLean Credit Union* terminated the right of plaintiffs to sue under that statute for race discrimination involving the conditions of employment (such as racial harassment), as distinct from discriminatory practices in the creation of the employment contract itself. The combination of *Patterson* and the limited remedies then allowed under Title VII thus meant that victims of certain forms of intentional race discrimination in employment likewise had no adequate remedy for that wrongdoing.⁵

⁵ As of 1990, more than 200 claims of race discrimination had been dismissed by the federal courts as a result of the *Patterson* decision. S. Rep. No. 315, 101st Cong., 2d Sess. 13 (1990) (citing statement of Julius Chambers, Director-Counsel, NAACP Legal Defense and Educational Fund, Inc.). *See also* Women's Legal Defense Fund, *The Unjust Workplace: The Impact of the Patterson Decision on Women* (reprinted in *The Civil Rights Act of 1991*:

**B. Congress Passed The 1991 Civil Rights Act Upon
An Extensive Record Demonstrating The Remedial
Inadequacies Of The Civil Rights Laws**

In response to *Patterson* and several other decisions of this Court "that sharply cut back on the scope and effectiveness of these important federal laws" (*i.e.*, Title VII and Section 1981), *see* H.R. Rep. No. 40 Part II, 102d Cong., 1st Sess. 2 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, at 694, and in response to the remedial inadequacies of Title VII, Congress undertook to amend those statutes. In considering the proposed legislation that ultimately became the Civil Rights Act of 1991, Congress heard testimony from, *inter alia*, numerous individuals who had been sexually harassed at work in violation of Title VII, and/or who had been victimized by race discrimination in employment, yet who had received no compensation for the injuries that they had suffered as a consequence of that intentional wrongdoing. Many of these witnesses presented facts that had been adjudicated by federal courts as constituting intentional discrimination in violation of federal law. The painful testimony that they gave before Congress was a ringing indictment of the inadequacies of the laws to remedy such discrimination, and formed the basis on which Congress then acted.

1. Sexual harassment

For example, Carol Zabkowicz, a warehouse worker with the West Bend Company in Oak Creek, Wisconsin, described the vicious sexual harassment to which she had been subjected at work:

My co-workers would constantly pull on my bra straps. One of my co-workers left a handwritten poem on my desk regarding my sex life with my husband. Another man would often call me a "sexy

Hearings on H.R. 1 Before the House Comm. on Education and Labor, 102d Cong., 1st Sess. 770-92 (1991)).

bitch" or "H and H," which I discovered meant "Hot and Horny." Still another would grab his penis in front of me and ask me if I could handle his "25 pounder." He would also call out to me. When I looked in his direction, he would be standing with his buttocks exposed.

Another man also exposed his buttocks to me, and on occasion, would lift up the leg of the cutoff shorts he was wearing, call my name, and expose his testicles to me. This same man made a huge cardboard cutout of a penis, with which he would pretend to poke me in the buttocks when my back was turned.

Yet another man would post drawings of caricatures of myself. These drawings would depict me naked, often performing sexual acts with either a human being or an animal. My initials would be written on the drawings.

Because I knew these acts were wrong, I repeatedly reported this outrageous behavior to my immediate supervisor and my manager, but to no avail. . . . During this time, my emotional and physical health suffered. I was anxious, nervous, had poor concentration and cried easily. I suffered vomiting, severe nausea, diarrhea and cramping. My doctor testified at my trial that I suffered from a gastrointestinal disorder as a result of the harassment at work, and the judge accepted this as fact.

In 1982, when I was pregnant with my second child, the harassment was still going on. My health continued to decline, and I started to lose weight. My OB-GYN, who was aware of my horrendous working conditions, told me that for the sake of my health, and the health of the child that I was carrying, I had to take a medical leave of absence from work, and I did this.

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House Comm. on the Judiciary, 101st Cong., 2d Sess. (1990) (hereafter "*Civil Rights Act 1990 House Hearings*"), Vol. 2 at 3-4.

A federal court found that Ms. Zabkowitz had been subjected to "a campaign of abuse" and "sustained, malicious, and brutal harassment." *Zabkowitz v. West Bend Co.*, 589 F. Supp. 780, 782, 784 (E.D. Wis. 1984), *aff'd in part and rev'd in part on other grounds*, 789 F.2d 540 (7th Cir. 1986). The court also found that despite Ms. Zabkowitz's repeated complaints about this unconscionable treatment, her employer for years "never conducted an investigation or disciplined a single employee," and held the employer liable for sexual harassment under Title VII. 589 F. Supp. at 785. Nonetheless, Ms. Zabkowitz was awarded only \$2,763.20—back pay for wages lost during an illness caused by the harassment. *Id.* at 783, 785. Ms. Zabkowitz received no compensation for her medical bills or for her emotional distress. In fact, had she not become so physically ill that she could not work, Ms. Zabkowitz would have received no compensation at all despite having been victimized by intentional and sustained violations of federal law.

The case of Helen Brooms, a 36-year-old African American industrial nurse, was equally revealing of the inadequacies of Title VII. Ms. Brooms, a married mother of three, had been racially and sexually harassed by her supervisor and forced to leave her job as a result of the harassment. As a federal judge found, Ms. Brooms's supervisor had, among other things, made numerous explicit racial and sexual remarks to her and showed her pornographic photographs, including a "photograph depicting an interracial act of sodomy" which the supervisor told Ms. Brooms "showed the 'talent' of a black woman" and depicted the purpose for which she had been hired. *Brooms v. Regal Tube Co.*, 881 F.2d 412, 416-17 (7th Cir. 1989). In testimony before Congress, Ms. Brooms further described the harassment to which she had been subjected:

He [the supervisor] told me I was "the best looking piece of ass" at a company party and asked if there was room in my pants for him. . . . He said he wanted to place salt on my genitalia and eat it off. He asked me to smoke marijuana with him for it made him oversexed. He remarked that I needed breast surgery.

While attending an out-of-town conference, my boss propositioned me for sexual favors, described the size of his penis and said black women had, throughout history, borne white men's babies. I was so upset and frightened that as a result, I suffered severe rectal bleeding and required medical attention.

Civil Rights Act 1990 House Hearings, supra, Vol. 2 at 16-17.

The harassment of Ms. Brooms culminated in an incident in which her supervisor showed her a picture depicting bestiality and threatened to kill her if she did not submit to him. Ms. Brooms "ran from him, screaming in terror, and in [her] haste to escape, fell down a flight of stairs" and suffered permanent physical injury. *Id.* at 17. Although Ms. Brooms left her job, the effects of the harassment continued; as Ms. Brooms explained, she "suffered a severe and debilitating depression requiring psychiatric treatment [and] was unable to work." *Id.* Despite all her anguish and pain, Ms. Brooms received only an award of back pay, and this only because the trial court had concluded that the harassment was so severe as to constitute a constructive discharge. *Id.* at 16; 881 F.2d at 417. Ms. Brooms received no compensatory damages for any of the other consequences of the harassment, including her resulting medical bills and emotional distress.

Jacqueline Morris, a machinist at the American National Can Corporation, was similarly left without any remedy for the campaign of sexual harassment conducted against her by her co-workers. As she testified before Congress:

On more than one occasion, the manager of forming operations for the plant touched my buttocks,

told me that I "had a nice ass" and that he would "like to have a piece of that";

At one staff meeting I asked my supervisor where I should sit, and he responded by moving my head down while saying something to the effect that "you might as well sit underneath my desk since that's where you do your best work";

On more than one occasion, my immediate supervisor touched my breasts, touched my buttocks, made remarks to me such as "didn't you get any last night," and "do you spit or swallow," and made references to my breasts and buttocks;

Numerous offensive materials were left at my work station, including a clay replica of a penis with steel wool testicles

The Civil Rights Act of 1991: Hearings on H.R. 1 Before the House Comm. on Education and Labor, 102d Cong., 1st Sess. (1991) (hereafter "Civil Rights Act 1991 House Hearings"), at 124.

After exhausting all internal grievance procedures, Ms. Morris filed a charge of discrimination with the EEOC, yet the harassment escalated. As she explained to Congress:

At various times, I found the words "bitch," "slut," "whore" and "Jackie blows head" written on my desk or near my work station;

A picture which showed a nude woman touching her breasts was left at my work station with a note that said "you should be doing this instead of [a] man's job";

A substance which smelled like urine was put in the air line of my air compressor;

A semen-like substance was left on the chair at my workbench.

Id. at 125.

As a result of the abuse, Ms. Morris suffered from breathing difficulties, nervousness, sleeplessness, and blotches and welts on her legs and back, all of which subsided whenever she took time off from work. Ultimately, a federal court found her employer liable for sexual harassment in violation of Title VII. *Morris v. American Nat'l Can Corp.*, 730 F. Supp. 1489 (E.D. Mo. 1989), *aff'd in part and rev'd in part on other grounds*, 941 F.2d 710 (8th Cir. 1991). Despite this violation of her federal rights—the details of which the Eighth Circuit called "sordid and egregious," 941 F.2d at 712—Ms. Morris received only retroactive seniority and back pay with interest for the work that she had missed, and nothing for the pain, suffering, humiliation, and health-related problems that she had endured. 730 F. Supp. at 1497-98.

The case of Patricia Swanson, another victim of sexual harassment, provided perhaps the most compelling example not only of the inadequacy of Title VII's remedies but also of the egregious and absurd results of that inadequacy when carried to its inevitable conclusion. As Ms. Swanson reported to Congress, the supervisor at the car dealership where she worked as an assistant finance manager had repeatedly made lewd, offensive and embarrassing comments to her, sometimes in the presence of other employees, had repeatedly attempted to unhook her bra, had run his hand up her skirt and grabbed her between her legs, had pulled down his pants and stood naked in front of her, and had repeatedly threatened that he would make her have sex with him. *Civil Rights Act 1990 Senate Hearing, supra*, at 186-88. This conduct caused Ms. Swanson to feel "like [she] was a prisoner in [her] own office . . . [and caused her migraine headaches] so bad [she] almost passed out." *Id.* at 188. Ms. Swanson was subsequently discharged.

Although Ms. Swanson filed suit, the response of the federal courts to the concededly unlawful conduct to which she had been subjected only served to compound

her suffering. Even though the trial judge found, and the Court of Appeals agreed, that Ms. Swanson had been sexually harassed, Ms. Swanson was awarded no relief because the courts concluded that she had been discharged for reasons unrelated to the harassment. And since no compensatory or punitive damages were available under Title VII to remedy the harassment, the defendant was considered to be the prevailing party and Ms. Swanson was ultimately ordered to pay the defendant's court costs. *Id.* at 188-89. See *Swanson v. Elmhurst Chrysler Plymouth, Inc.*, 882 F.2d 1235, 1240 (7th Cir. 1989) ("since Swanson cannot recover any award under Title VII, [the defendant] must receive judgment even if there has been a violation of that statute"), *cert. denied*, 493 U.S. 1036 (1990).

In sum, and as stated to Congress by the American Bar Association, Title VII left "many victims of employment discrimination without remedies for their proven injuries and allow[ed] certain employers who discriminate to avoid any meaningful liability." *Civil Rights Act 1990 House Hearings, supra*, Vol. 1 at 533.

2. Race discrimination

As Congress further heard, victims of intentional race discrimination suing under Section 1981 fared no better after *Patterson*. For example, in the case of Bunny Kishaba, a woman of Hawaiian-Chinese ancestry who had been employed as an executive secretary for Hilton Hotels in Hawaii and who had sued Hilton for race discrimination, it was

undisputed that [Kishaba's supervisor] McDonough made many derogatory and discriminatory remarks about various ethnic groups . . . McDonough referred to a Japanese person as a "Jap" and compared local people to "the spics in New York," stating that locals are "not capable of being supervisors" and are "incompetent." . . . Kishaba witnessed racist behavior of a more subtle kind. When

a Jewish group attempted to contact the executive office, McDonough told her to have D'Rovencourt take care of it because "he's our resident." She asserts that there was no doubt from his manner that he meant "resident Jew." . . . McDonough told her . . . "in a contemptuous way" that "I have to have the only secretary who does the hula." Additionally, McDonough frequently used the term "you people" in such phrases as "what's the matter with you people" or "if you people don't shape up, I'll get rid of all of you." Kishaba states that "there was no doubt whatever" that his references to "people" were to local Asians and Hawaiians.

Civil Rights Act 1990 House Hearings, supra, Vol. 1 at 176-77 (quoting *Leong v. Hilton Hotels Corp.*, 50 F.E.P. Cas. 738, 739 (D. Haw. 1989)). Nonetheless, the court held that, after *Patterson*, Ms. Kishaba's claim of racial harassment was no longer actionable under Section 1981. *Leong*, 50 F.E.P. Cas. at 741.⁶

The court in Ms. Kishaba's case also held that she could not obtain compensatory or punitive damages under Title VII, 50 F.E.P. Cas. at 741, thus underscoring the devastating effect that *Patterson* had, particularly on women of color victimized by harassment, by its elimination of an alternative to Title VII's inadequate remedies. This harsh reality was brought home to Congress by the evidence presented during the hearings on the 1991 Act. See, e.g., *Civil Rights Act 1991 House Hearings, supra*, at 770-92 (reprinting Women's Legal Defense Fund, *The Unjust Workplace: The Impact of the Patterson Decision on Women*).

⁶ See also *Civil Rights Act 1990 House Hearings, supra*, Vol. 1 at 177-78, discussing *Dangerfield v. Mission Press*, 50 F.E.P. Cas. 1171 (N.D. Ill. 1989), in which the court held that "contemptible" racist conduct to which the plaintiff employees allegedly had been subjected was not actionable under Section 1981 after *Patterson*.

3. The response of Congress

The witnesses who appeared before Congress were only a few of the many individuals who have been victimized by egregious and intentional acts of discrimination in violation of Title VII and/or Section 1981, yet who have received little or no compensation for their injuries.⁷ Having heard from those victims, as well as from civil rights leaders, elected officials, and members of the academic and business communities, Congress realized the magnitude of the inequities caused by the remedial gap in Title VII and by *Patterson*.⁸

⁷ See, e.g., National Women's Law Center, *Title VII's Failed Promise: The Impact of the Lack of a Damages Remedy* (1991) and cases collected therein (reprinted in *Civil Rights Act 1991 House Hearings*, supra, at 581-629); Judith A. Winston, *Mirror, Mirror on the Wall: Title VII, Section 1981, and the Intersection of Race and Gender in the Civil Rights Act of 1990*, 79 Cal. L. Rev. 775 (1991) (offering additional case accounts).

⁸ The remedial inadequacies of the civil rights laws were communicated to Congress by a wide variety of people and groups. See H.R. Rep. No. 40 Part I, 102d Cong., 1st Sess. 17-18 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 555-56; *Civil Rights Act 1990 House Hearings*, supra, Vol. 2 at III-IV; *Civil Rights Act 1990 Senate Hearing*, supra, at III-VI. The need for strengthening Title VII's remedies had also been recognized by officials of government agencies involved in equal employment issues and by legal commentators. See, e.g., Clarence Thomas, *Discrimination and Its Effects*, 21 Integrated Education 204 (1983) (arguing that "equitable remedies available under Title VII are not as compelling as the civil damages available under other federal statutes" and suggesting a need for more effective remedies); and authorities cited supra p. 7.

In addition, a number of federal courts had also recognized the failure of Title VII's "equitable" remedies. See, e.g., *Beesley v. Hartford Fire Ins. Co.*, 723 F. Supp. 635, 647 (N.D. Ala. 1989) (the lack of compensatory and punitive damages as a remedy makes "a Title VII sexual harassment claim, as a practical matter, meaningless"); *Stewart v. Thomas*, 538 F. Supp. 891, 897 (D.D.C. 1982) ("[t]o the extent that Title VII fails to capture the personal nature of the injury done to this plaintiff as an individual, the remedies provided by that statute fail to appreciate the relevant dimensions of the problem in this [sexual harassment] case");

In the 1991 Act, Congress made a reasoned judgment to rectify these inequities through two measures—the restoration of the law under Section 1981 as it had existed prior to *Patterson*, and the provision of compensatory and punitive damages under Title VII. This legislation not only took an important step toward closing the "gigantic loophole" in Title VII (caps were placed on damages), but addressed a serious problem that had particularly confronted women of color. Because of the remedial discrepancies that had existed between Title VII and Section 1981, women of color victimized by employment discrimination had been confronted with a legal system in which employer-defendants endeavored to pigeonhole their claims into a race-based or sex-based box, rather than recognize that such claims were generally inseparable. See Judith A. Winston, *Mirror, Mirror on the Wall: Title VII, Section 1981, and the Intersection of Race and Gender in the Civil Rights Act of 1990*, 79 Cal. L. Rev. 775 (1991); Judy Trent Ellis, *Sexual Harassment and Race: A Legal Analysis of Discrimination*, 8 Journal of Legislation 30 (1981). With the 1991 Act, it is less likely that women of color will be subjected to artificial efforts to separate a single individual by race and gender.

By amending Section 1981 and adopting new Section 1981a, Congress sought to put an end to the violation of rights without remedies. This overarching purpose of the 1991 Civil Rights Act—to ensure that victims of invidious discrimination in employment have meaningful legal remedies—was effectively summarized by Senator Leahy, an original co-sponsor of the Act:

Compston v. Borden, Inc., 424 F. Supp. 157, 162 (S.D. Ohio 1976) ("[w]ere compensatory damages available to a Title VII plaintiff, this Court would not hesitate to enter such an award in this case, because it is apparent from the evidence that [the plaintiff] suffered mental anguish and humiliation at defendants' hands").

Under existing civil rights laws, the best a woman who is intentionally harassed in the workplace can hope for from our legal system is a court order saying that her boss should stop. If her boss starts to harass her again, the only thing she can do is go back to court to get yet another order telling her boss to behave. . . . [W]ithout the improvements of the Civil Rights Act of 1991, there would be no penalty for the employer, no adequate compensation for the victim.

* * * *

[And if] . . . an employer intentionally harasses or otherwise persecutes an employee solely on account of race, the current civil rights laws cannot require the employer to compensate that person fully for the damage he has caused, no matter how great or how real. Nor can the employer be forced to pay punitive damages no matter how outrageous his conduct has been. By overturning the Supreme Court's decision in *Patterson* versus *McLean Credit Union*, the Civil Rights Act of 1991 would remedy this injustice.

The penalties for civil rights violations—for depriving citizens of the fundamental principles of equality and fairness on which this Nation was founded—should not be inferior to legal claims for breaching a contract, violating the Sherman Act, or infringing a copyright. This bill goes a long way toward setting this priority straight and *recognizing the importance of protecting all Americans from discrimination by providing a meaningful legal remedy.*

137 Cong. Rec. S15489 (daily ed. Oct. 30, 1991) (emphasis added).⁹

⁹ See also 137 Cong. Rec. H9532-33 (daily ed. Nov. 7, 1991) (statement of principal sponsor Rep. Fish noting that Congress is "united in again responding appropriately to the reality of discrimination" by "provid[ing] a necessary remedy [monetary relief] for those who continue to be victimized" and by "effectively overturn[ing] Supreme Court rulings because we cannot ignore the judicial erosion of important protections for women and members

Despite the clear purpose of Congress in passing the 1991 Act and the extensive and explicit record on which Congress acted, the respondents in the instant cases would have this Court continue to apply a remedially-deficient civil rights jurisprudence. For the reasons set forth below, this Court should decline that invitation to prolong the injustice that Congress so plainly intended to end.

II. THE FEDERAL COURTS ARE OBLIGATED TO PROVIDE AN ADEQUATE REMEDY FOR THE VIOLATION OF A FEDERAL RIGHT, UNLESS THAT REMEDY IS SPECIFICALLY FORECLOSED BY CONGRESS—WHICH IS NOT THE CASE HERE

The instant cases, if not reversed, would perpetuate the situation in which federal rights can be violated without an adequate remedy being accorded to the victims—the very situation that Congress intended to eradicate by passage of the Civil Rights Act of 1991. This Court should reverse the judgments below based on the long-established principle that a federal court is obligated to ensure an adequate remedy for a violation of federal law, provided that the remedy has not been foreclosed by Congress.

It is well-settled that for every available statutory right there must be an appropriate remedy for a deprivation

of minority groups"); H.R. Rep. No. 40 Part I, 102d Cong., 1st Sess. 64-65 (1991), 1991 U.S.C.C.A.N. at 602-03 ("[m]onetary damages also are necessary to make discrimination victims whole for the terrible injury to their careers, to their mental and emotional health, and to their self-respect and dignity"); 137 Cong. Rec. H9526 (daily ed. Nov. 7, 1991) (statement of principal sponsor Rep. Edwards noting that "[c]ompensatory damages are necessary to make discrimination victims whole for the terrible injury to their careers, to their mental, physical, and emotional health, to their self-respect and dignity, and for other consequential harms" and further stating that "Section 101 fills the gap in the broad statutory protection against intentional racial and ethnic discrimination covered by Section 1981 . . . that was created by the Supreme Court decision in *Patterson*").

of that right. Chief Justice John Marshall stated in 1803 what has been a guiding legal principle ever since: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. . . . '[E]very right, when withheld, must have a remedy, and every injury its proper redress.'" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 Blackstone *Commentaries* 109).

This rule guarantees to victims of statutory violations that courts will provide the necessary remedies, particularly when the violations are of federal law. As this Court has stated on repeated occasions:

[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.

Bell v. Hood, 327 U.S. 678, 684 (1946) (footnotes omitted); accord *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969); *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964).

This Court reaffirmed the vitality of this important and bedrock legal doctrine as recently as last Term. In *Franklin v. Gwinnett County Public Schools*, 112 S. Ct. 1028 (1992), the Court held that compensatory damages are available as a remedy in a private action challenging an intentional violation of Title IX of the Education Amendments of 1972 ("Title IX").¹⁰ The Court reached this conclusion by applying the rationale of *Bell v. Hood* and its progeny, and stated that damages must be made

¹⁰ The private right of action is not expressly authorized by Title IX but was itself deemed to exist by this Court in *Cannon v. University of Chicago*, 441 U.S. 677 (1979).

available because, without them, the federal remedy would clearly be inadequate and would in fact "accord[] . . . no remedy at all." 112 S. Ct. at 1038.

The one exception to the requirement that all appropriate relief be awarded in any action to vindicate a federal right is in those instances in which there exists a clear indication of a contrary legislative intent. As this Court stated in *Franklin*, "we presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise." 112 S. Ct. at 1032 (citing *Davis v. Passman*, 442 U.S. 228, 246-47 (1979)).

No contrary congressional expression exists here. Whether or not Title VII as originally enacted allowed compensatory and punitive damages, see *supra* note 4, 42 U.S.C. § 1981a now plainly does, and that statute, which is Section 102 of the 1991 Act, contains no bar to its application in pending cases.¹¹ In *Franklin*, this Court refused to create a remedial bar not imposed by Congress, and it should do the same here. Indeed, given the plain language of 42 U.S.C. § 1981a, the express recognition by Congress of the inadequacy of Title VII's remedies, and the intent of Congress to ensure the availability of compensatory and punitive damages and put an end to cases such as that of Pat Swanson, Helen Brooms—and Barbara Landgraf—it would be highly anomalous for this Court to continue to apply Title VII in a limited remedial manner.¹²

¹¹ By contrast, see Sections 109(c) and 402(b) of the Act (42 U.S.C. § 2000e note and 42 U.S.C. § 1981 note, respectively), which contain express prohibitions on retroactive application of the section of the Act that overturns *EEOC v. Arabian American Oil Co.*, 111 S. Ct. 1227 (1991), and of the entire Act to certain defined "disparate impact cases" (i.e., *Wards Cove Packaging Co. v. Atonio*, 490 U.S. 642 (1989)).

¹² Indeed, given the decision in *Franklin*, one court has recently concluded that Title VII itself (as distinct from 42 U.S.C. § 1981a) should be interpreted to allow compensatory and punitive damages. See *Berry v. Stevenson Chevrolet*, 804 F. Supp. 121, 136-37 (D. Colo. 1992).

Similarly, Congress recognized that *Patterson* had created an untenable remedial problem for victims of intentional race discrimination in employment. Although the right to a workplace free of such discrimination continued under Title VII after *Patterson*, the comprehensive remedy for a violation of that right provided by Section 1981 was no longer available. Section 1981 as amended by Section 101 of the 1991 Civil Rights Act thus restores those remedies for the violation of rights that existed at all relevant times. Like Section 102 of the Act, Section 101 contains no bar to retroactive application. *Bell* and *Franklin* thus require that Section 1981 as amended by the Act be applied in pending cases so that adequate remedies will be available to victims of intentional race discrimination in employment.

The obligation of the courts to provide an adequate remedy for the violation of an employee's right to a workplace free of invidious discrimination, through the application of 42 U.S.C. § 1981a and Section 1981 as amended by the 1991 Act, is not only required by *Bell* and *Franklin*, but would comport with the goal of the civil rights laws to end "the injustices and humiliations of racial and other discrimination," H.R. Rep. No. 914, 88th Cong., 1st Sess. 18 (1963), reprinted in 1964 U.S.C.C.A.N. 2391, 2394, and serve to effectuate the "purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). *Accord Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976). As this Court stated in *County of Washington v. Gunther*, 452 U.S. 161 (1981), "a 'broad approach' to the definition of equal employment opportunity is essential to overcoming and undoing the effect of discrimination. *We must therefore avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate.*" *Id.* at 178 (emphasis added, citation omitted).

It is undisputed that Barbara Landgraf suffered "significant sexual harassment at the hands of [a co-worker]," *Landgraf*, 968 F.2d at 429, a clear and intentional violation of Title VII, yet she received no relief for the resulting injuries. Similarly, the petitioners in *Rivers* had the remedies previously available to them under law taken from them as a result of this Court's ruling in *Patterson*. Both cases now before this Court involve precisely the type of injustice that Congress sought to rectify with passage of the 1991 Act, *i.e.*, the violation of rights without remedies. (Indeed, the similarities between *Landgraf* and *Swanson* are quite striking.) It would be directly contrary to the teachings of *Bell* and *Franklin* for the Court—in the absence of a clear statutory directive—to refuse to apply the relevant sections of the 1991 Civil Rights Act to pending cases and thus continue to turn away victims of intentional discrimination without affording them adequate relief. And it would be particularly ironic for the Court to do so in a sexual harassment case—the paradigm of what prompted Congress to act.

III. ASSUMING, *ARGUENDO*, THE APPLICATION OF RETROACTIVITY ANALYSIS, PRECEDENT REQUIRES THAT THE CIVIL RIGHTS ACT OF 1991 BE APPLIED TO PENDING CASES

For the reasons discussed above, *Bell v. Hood* and its progeny compel the application of the Civil Rights Act of 1991 to pending cases so that prevailing plaintiffs may be afforded a remedy for the violation of their federally-protected rights. Thus, these cases do not implicate traditional "retroactivity" analysis. However, assuming, *arguendo*, that this Court determines to apply such analysis, *Bradley v. School Board of City of Richmond*, 416 U.S. 696 (1974), requires that the Civil Rights Act of 1991 be applied to cases pending at the time of enactment.

In *Bradley*, a unanimous Court (with two Justices not participating) held that a statute granting the federal courts the authority to award reasonable attorneys' fees in school desegregation cases applied to counsel's services rendered prior to enactment of the statute. The Court noted that its holding was "anchor[ed] . . . on the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." 416 U.S. at 711.¹³

With respect to the 1991 Civil Rights Act, neither of these two exceptions to the *Bradley* rule exists. As the Briefs of the petitioners demonstrate, there is no "statutory direction or legislative history" that requires the prospective application of the Act except with respect to certain specific sections not at issue here. See *supra* note 11. To the contrary, and for the reasons set forth in *Reynolds v. Martin*, 985 F.2d 470, the plain language of the Act requires that the statute be applied to pending cases, except as otherwise expressly provided, which should end the inquiry.

Assuming, *arguendo*, that one disagrees with *Reynolds*, the most that can be argued in favor of a prospective application of the Act based on the statute and its legislative history is that they are ambiguous as to that issue; even the courts that have held the Act to be prospective

¹³ While an "apparent tension" has been observed between *Bradley* and the subsequent opinion in *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988) (see *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990)), *Bowen* in fact involved the potential retroactivity of an administrative rule, and its holding turned on the agency's lack of authority to adopt retroactive rules. By contrast, *Bradley* and the instant cases involve civil legislation duly enacted by the Congress of the United States, which plainly does have the authority to enact retroactive civil statutes. In any event, further analysis of this issue is beyond the scope and purpose of this Brief *amici curiae*, and *amici* respectfully refer the Court to the Briefs of the petitioners on this issue.

only have had to concede this—including the courts in the two cases now before this Court. See, e.g., *Harvis v. Roadway Express, Inc.*, 973 F.2d 490, 496 (6th Cir. 1992) (referring to the Act's "ambiguous legislative history and language"); *Landgraf*, 968 F.2d at 432 ("there is no clear congressional intent on the general issue of the Act's application to pending cases"). Under *Bradley*, an ambiguous legislative history that can be read as supportive of either retroactivity or prospectivity provides "at least implicit support for the application of the statute to pending cases," 416 U.S. at 716, and is not a bar to such application. Thus, the exception to the *Bradley* norm of retroactivity based on a congressional directive of prospectivity is inapplicable here.

The other exception to the *Bradley* rule—manifest injustice—is equally inapplicable. The *Bradley* Court articulated a three-part test as a guide in determining "the possible working of an injustice" in the application of a new statute to pending cases; that test examines "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." 416 U.S. at 717. An application of that test in the instant cases confirms that no "manifest injustice" would result from holding the Act applicable in these cases.

First, while these cases technically involve disputes between private parties, Title VII and Section 1981 are intended to create a society free of invidious discrimination. Plaintiffs who successfully sue under these statutes thus advance important federal goals, and are therefore considered to be acting as private attorneys general in effectuating those goals. See, e.g., *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418 (1978) (Title VII plaintiff "is the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority'" (citation omitted)); *Brown v. Culpepper*, 559 F.2d 274, 277-78 (5th Cir. 1977) (Section 1981). It is significant to note that in *Bradley* itself, this Court recog-

nized the public importance of school desegregation cases in part by comparing them with suits brought to enforce the Civil Rights Act of 1964 (of which Title VII is a part), noting that private litigation is a necessary means of securing broad compliance with such laws. 416 U.S. at 719.

Like the school desegregation statute at issue in *Bradley*, Title VII and Section 1981 involve "great national concerns" and must therefore be decided "according to existing laws." *Bradley*, 416 U.S. at 719 (citing *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801)). Thus, application of the first part of the *Bradley* "injustice" test favors retroactivity.

The second part of that test likewise provides no support for prospectivity, since application of the 1991 Civil Rights Act to pending cases would not "infringe upon or deprive a person of a right that had matured or become unconditional." *Bradley*, 416 U.S. at 720. Simply put, no one has a right to violate federal law, and federal law at all relevant times has prohibited invidious discrimination in employment. As Congress recognized in 1990, "[t]wenty-six years after Title VII of the Civil Rights Act of 1964 was enacted . . . [v]irtually everyone in America now understands that it is both 'wrong' and 'illegal' to discriminate intentionally." H.R. Rep. No. 644 Part 1, 101st Cong., 2d Sess. 9 (1990). The hostile work environment to which Barbara Landgraf was subjected unquestionably violated Title VII, as the lower courts found. And the discriminatory conduct of the respondent in *Rivers* as alleged violated both Title VII and Section 1981 as then interpreted by the courts.¹⁴

¹⁴ It should be kept in mind that hundreds of pending Section 1981 cases were dismissed by the lower courts and jury awards in favor of plaintiffs overturned following this Court's decision in *Patterson*, although the conduct at issue in those cases was recognized to be unlawful under Section 1981 (and Title VII) prior to that decision. See *supra* note 5; H.R. Rep. No. 644 Part 1, 101st Cong., 2d Sess. 18 (1990); *Civil Rights Act 1990 House Hearings*,

The final prong of the "injustice" test examines the "possibility that new and unanticipated obligations may be imposed upon a party without notice or an opportunity to be heard." *Bradley*, 416 U.S. at 720. This concern is not implicated here for the very reasons set forth by this Court last Term in *Franklin v. Gwinnett County*. In its ruling that compensatory damages are available in Title IX cases in which intentional discrimination is alleged, this Court held that no notice problem arises, precisely because the violation is intentional. See *Franklin*, 112 S. Ct. at 1037. The instant cases likewise involve adjudicated or alleged acts of intentional discrimination, and the statutes at issue here, 42 U.S.C. §§ 1981 and 1981a, apply only to intentional discrimination. Thus, the respondents in the instant cases can have no more claim of "injustice" or "unfairness" in the availability to the petitioners of an effective remedy for intentional wrongdoing than did the defendants in *Franklin*. The Court properly rejected such a notion in *Franklin* and it should likewise do so here.¹⁵

In sum, *Bradley* demonstrates that there would be no "injustice," let alone "manifest" injustice, in applying the Civil Rights Act of 1991 to pending cases. Indeed, for all the reasons discussed in Sections I and II, *supra*, it would be manifestly unjust to continue to leave victims of intentionally unlawful conduct without an adequate

supra, Vol. 3 at 311-14 (statement of Patricia Carroll). Given the courts' retroactive application of *Patterson* to pre-*Patterson* conduct and cases, it would be most ironic and unjust for the corrective legislation not to be applied in the cases of numerous plaintiffs who would otherwise be caught in a judicially-created remedy gap, and it would create a windfall for defendants who had intentionally engaged in discriminatory conduct understood to be unlawful.

¹⁵ The fact that a prayer for compensatory damages would give a defendant the right to a jury trial or require "a retrial on damages before a properly instructed jury" does not implicate the "manifest injustice" exception to retroactivity. See *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 486 n.16 (1981).

remedy and permit the wrongdoers to escape without liability, or, even worse, with an order that their court costs be paid by their victims.

CONCLUSION

The decision of the Court of Appeals in each of these cases should be reversed and remanded.

Respectfully submitted,

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APPENDIX

APPENDIX**STATEMENTS OF INDIVIDUAL *AMICI CURIAE***

The National Women's Law Center (NWLC) is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunity in the workplace through the full enforcement of Title VII of the Civil Rights Act of 1964 as amended. NWLC strongly supported enactment of the Civil Rights Act of 1991 and believes that the amendments made by the Act are properly applied to litigation pending on the date of its enactment.

The Women's Legal Defense Fund (WLDF) is a national advocacy organization that was founded in 1971 to advance the rights of women in the areas of work and family. WLDF works to challenge gender discrimination in the workplace through litigation of significant sex discrimination cases, public education, and advocacy for improvements in the equal employment opportunity laws and their interpretation before Congress and the federal agencies charged with their enforcement. Throughout this work, WLDF has placed special emphasis on equal employment opportunity for women of color, who often face job discrimination based on both race and gender.

The American Association of University Women (AAUW) has promoted equity and education for women and girls since 1881. AAUW's 130,000 members are committed to achieving equal opportunities and fair treatment for women in the workplace.

The American Association of University Women Legal Advocacy Fund provides funding and a support system for women seeking judicial redress for sex discrimination. Since it was founded in 1981, the Legal Advocacy Fund has supported the lawsuits of more than 22 women

filing employment discrimination cases against institutions of higher education.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to preserving and enhancing the fundamental civil rights and civil liberties embodied in the Constitution and civil rights laws of this country. In particular, the ACLU has long been involved in the effort to eliminate racial discrimination in our society. The Women's Rights Project of the ACLU Foundation was established to work toward the elimination of gender-based discrimination in our society. In pursuit of that goal, the ACLU has participated in numerous discrimination cases before this Court and worked for the passage of the Civil Rights Act of 1991.

The Americans for Democratic Action, a progressive, independent political organization, is a national coalition of civil rights and feminist leaders, academicians, business people and trade unionists, grass roots activists, elected officials, church leaders, professionals, members of Congress and many others.

The California Women's Law Center (CWLC) is a private, non-profit public interest law center specializing in the civil rights of women and girls. CWLC was established in 1989 to address the comprehensive civil rights of women and girls in the following priority areas: sex discrimination, including sex discrimination in education, reproductive rights, family law, violence against women, child care, and discrimination in employment. The application of the Civil Rights Act of 1991 will have a far reaching impact on women who are currently pursuing their rights through the courts and who will be left without a remedy if the Civil Rights Act of 1991 is limited in its application.

The Center for Women Policy Studies was founded in 1972 as the first national policy research and advocacy

institute focused exclusively on issues of social and economic justice for women. The Center conducts research and advocacy programs on sexual harassment and violence against women, work/family and "diversity" policies of employers, education, and other relevant issues.

The Coalition of Labor Union Women (CLUW) is a national membership organization of women and men who are members of more than 65 international unions. CLUW has 45 active chapters and a National Executive Board composed of the female leadership of these international unions. A primary purpose of this national coalition is to remove all forms of discrimination from the workplace.

Equal Rights Advocates, Inc. (ERA) is a San Francisco-based public interest legal and education corporation dedicated to working through the legal system to secure equality for women. ERA has a long history of interest, activism, and advocacy in all areas of the law that affect equality between the sexes. Since its inception almost 20 years ago, ERA has specialized in litigating employment discrimination cases, many of which are Title VII cases. By extending the benefits of the Civil Rights Act of 1991 to pending cases, society will be able to move more quickly to end unfair treatment and assure equality to all of its citizens.

Federally Employed Women, Inc. (FEW) is an international non-profit organization representing over one million civilian and military women employed by the federal government. Since its inception in 1968, FEW's primary objective has been to eliminate sex discrimination and enhance career opportunities for women in government. Recognizing the need for full enforcement of Title VII of the Civil Rights Act of 1964, as amended, FEW strongly supported enactment of the Civil Rights Act of 1991 and remains committed to ensuring that the procedures and remedies under that statute are fully

available to all victims of employment discrimination, including those persons whose cases were pending on its effective date.

The Feminist Majority Foundation is a non-profit, 501(c)(3) research and education organization, which seeks to transform the public debate on issues of importance to women's lives, and to empower women through educational and research projects. The Foundation is committed to eradicating gender and racial discrimination and sexual harassment in the workplace and in all sectors of society.

The Japanese American Citizens League (JACL) is the largest Asian American civil and human rights organization in the United States, consisting of 113 chapters nationwide. Since its formation as a non-profit organization in 1929, JACL has participated, either as a party or as *amicus curiae*, in many legal actions that have challenged racial discrimination against Japanese Americans and other Asian Americans. It has also supported the passage of legislation aimed at eradicating discrimination based on race, national origin, gender, religion, sexual orientation and disabilities.

The National Committee on Pay Equity (NCPE) is a coalition of labor unions, women's and civil rights organizations working exclusively on the problems of wage discrimination against women and people of color. NCPE represents the interests of over 20 million working Americans and worked in coalition with other civil rights organizations to enact the Civil Rights Act of 1991. We feel strongly that the Civil Rights Act Amendments should apply to all cases pending on the date the legislation became law, not just to those concerning conduct after the date of enactment. This issue is vital to safeguarding the rights of workers and ensuring that the law consistently and thoroughly protects workers against discriminatory conduct at the hands of employers.

The National Council of Jewish Women (NCJW), founded in 1893, is the oldest Jewish women's volunteer organization in America. NCJW's 100,000 members in more than 500 communities nationwide dedicate themselves, in the spirit of Judaism, to advancing human welfare and the democratic way of life through a combination of social action, education and community service. An active supporter of the Civil Rights Act of 1991 and its application to pending cases, the National Council of Jewish Women believes that individual liberties and rights guaranteed by the Constitution are keystones of a free and pluralistic society. Based on NCJW's *National Resolutions* stating our resolve to work for the "enforcement of sexual harassment laws and more stringent penalties for violators," we join this Brief.

The National Council of Negro Women, Inc. (NCNW) is a voluntary, community-based, non-profit membership organization founded in 1935. It has 33 National affiliate organizations and 250 community-based sections with an outreach to four million women. NCNW affirms its support of this *amicus* Brief in support of the application of the Civil Rights Act of 1991 to pending cases. As African American women, the issues of race discrimination and sexual harassment are of our utmost critical concern. Without application of the 1991 Act to pending cases, many victims of discrimination will be without recourse to address these egregious acts.

The National Organization for Women (NOW) is the nation's largest organization devoted to the advancement of women's rights, with over 280,000 members and more than 700 chapters in all 50 states and the District of Columbia. NOW has, since its inception, endorsed and promoted civil rights for all people. Hence, NOW actively worked for the passage of the Civil Rights Act of 1991 and supports its application to pending cases as an important element of full protection against employment discrimination.

The NOW Legal Defense and Education Fund (NOW LDEF) is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization for Women. A major goal of the NOW LDEF is the elimination of barriers that deny women economic opportunities. In furtherance of that goal, NOW LDEF has participated in numerous cases to secure full enforcement of the laws prohibiting employment discrimination, including *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991), *appeal pending* (11th Cir. argued Dec. 2, 1992).

The National Women's Conference Committee, appointed under Public Law 94-167 to implement the 1977 National Plan of Action for Women, is committed to address both sexual harassment (on which it has a national task force) and race discrimination (as addressed in the National Plan).

The National Women's Party was founded in 1913 by Suffragist Alice Paul, who was instrumental in passage of the 19th Amendment granting women the right to vote and who wrote the Equal Rights Amendment in 1923. Since the National Women's Party believes that all persons should be treated equally under the law regardless of gender, race or class, we join with the National Women's Law Center in support of applying the Civil Rights Act of 1991 to pending cases. Prevailing plaintiffs should be allowed a remedy for the discrimination they suffered and should not be deprived of a remedy because of the timing of the discrimination.

The Northwest Women's Law Center is a non-profit organization in Seattle, Washington, that works to advance the legal rights of women through litigation, education, and legislative advocacy, and by providing infor-

mation and referrals to women with legal problems. One of the Law Center's priorities is the elimination of sex discrimination in employment. The Law Center has participated in several cases involving sex discrimination in employment before the United States Supreme Court, including *Price Waterhouse v. Hopkins* and *California Federal Savings & Loan Association v. Guerra*.

People For the American Way (People For) is a non-partisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, People For now has over 300,000 members nationwide. People For has been actively involved in efforts to combat discrimination and promote equal rights, including supporting the enactment of the Civil Rights Act of 1991, participating in civil rights litigation, and conducting programs and studies directed at reducing problems of bias, injustice and discrimination.

The U.S. Section of the Women's International League for Peace & Freedom is pleased to join this Brief in support of the application of the Civil Rights Act of 1991 to pending cases. We have long worked to end inequity and discrimination of all kinds.

Women Employed is a national organization of working women, based in Chicago, with a membership of 2000. Women Employed works to empower women to improve their economic status and to remove barriers to economic equity through advocacy, direct service and public education. Since 1973, the organization has assisted thousands of working women with problems of sex discrimination, especially in the area of sexual harassment. The organization has a long history of monitoring the performance of equal employment opportunity enforcement agencies, analyzing equal opportunity policies,

and developing detailed proposals for improving enforcement efforts.

The Women's Law Project (WLP) is a non-profit, feminist legal advocacy organization, located in Philadelphia. Founded in 1974, WLP works to abolish discrimination and injustice and to advance the legal and economic status of women and their families through litigation, public education, and individual counseling. During the past nineteen years, WLP's activities have included extensive work in the area of sex discrimination in employment. WLP has a strong interest in the eradication of sex and race discrimination in the workplace, and in the availability of the strong and effective remedies of the Civil Rights Act of 1991 to cases pending on the date of its enactment.

The YWCA of the U.S.A. is a national women's membership organization committed to the empowerment of women and the imperative to eliminate racism. Strengthened by diversity, the Association draws together members from varied economic, racial, ethnic, age, and religious groups who strive to create opportunities for women's growth, leadership and power. Because of our mission to obtain peace, justice, freedom and dignity for all people, we join as *amicus curiae* in support of the application of the Civil Rights Act of 1991 to cases pending on the date of its enactment.

APR 30 1993

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

BARBARA LANDGRAF,

Petitioner,

—v.—

USI FILM PRODUCTS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

MAURICE RIVERS and ROBERT C. DAVISON,

Petitioners,

—v.—

ROADWAY EXPRESS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

**BRIEF OF ASIAN AMERICAN LEGAL DEFENSE AND
EDUCATION FUND, ASIAN LAW CAUCUS, INC., AND ASIAN
PACIFIC AMERICAN LEGAL CENTER OF SOUTHERN
CALIFORNIA, AS MEMBERS OF NATIONAL ASIAN PACIFIC
AMERICAN LEGAL CONSORTIUM, *ET AL.*, AS *AMICI CURIAE*
IN SUPPORT OF PETITIONERS**

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INTEREST OF AMICI CURIAE

This brief is respectfully submitted by the Asian American Legal Defense and Education Fund, the Asian Law Caucus, Inc., and the Asian Pacific American Legal Center of Southern California, as members of the National Asian Pacific American Legal Consortium, Inc., and other Asian American civil rights and civil liberties groups¹ as amici curiae in support of petitioners' appeals from the decisions below holding that the Civil Rights Act of 1991, Pub.L.No. 102-166, 105 Stat. 1071 (1991) (the "1991 Act" or the "Act") does not apply to cases pending when it became law. For the reasons set forth below and in the briefs of petitioners and other amici in support of petitioners, the amici herein urge the Court to reverse and hold that the Act *does* apply to pending cases.

Employment discrimination is one of the principal problems facing Asian Americans today, and all the amici herein are committed to the goals of eliminating discrimination in employment against Asian Americans and ensuring the fair and equal treatment of Asian Americans in all aspects of society.²

The United States Commission on Civil Rights recently highlighted the problems encountered by Asian Americans in employment:

Asian Americans face a number of barriers to equal participation in the labor market. Many of these barriers are

¹ Petitioners and respondents in both cases have consented to the filing of this brief. Appended to this brief are statements of the organizations that have joined in this brief as amici curiae.

² With a population of roughly 7.3 million, Asian Americans today make up almost 3% of the population of the United States. Over the past decade, Asian Americans have increased dramatically in number from 1.5% to 2.9% of the total population. The rate of the population growth of Asian Americans in the United States from 1980 to 1990 was 107.8%, more than double the rate for Hispanics (53%) and far exceeding the rates for Whites (6%) and Blacks (13.2%) during the same period. United States Commission on Civil Rights, *Civil Rights Issues Facing Asian Americans in the 1990s* (February 1992) ("USCCR Report") at 13-15.

encountered to a greater degree by the foreign born, who often confront linguistic and cultural barriers to finding employment commensurate with their education and experience, but even third- or fourth-generation Asian Americans find their employment prospects diminished because employers have stereotypical views of Asians and prejudice against citizens of Asian ancestry. Employment discrimination, to varying degrees, is a problem facing all Asian Americans. . . . [E]mployment discrimination against Asian Americans ranges from discrimination based on accent or language, to discrimination caused by our nation's immigration control laws, to artificial barriers preventing many Asian Americans from rising to management positions for which they are qualified.

USCCR Report at 130.

Hence, the issue of the applicability of the 1991 Act to pending cases is a question of great importance to the Asian American community, for if the decisions of the Fifth and Sixth Circuits in these cases are affirmed, many victims of employment discrimination will find themselves with drastically limited remedies—or no remedy at all. As this Court has repeatedly recognized, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.* ("Title VII"), is to be construed liberally to further its goals of eradicating discrimination and making victims of discrimination whole; those goals will only be frustrated by affirmance of the decisions below.

The language of the 1991 Act strongly supports the view that it should be applied to pending cases generally, for Section 402(a) states that "this Act shall take effect upon enactment." When Congress did not want the Act to be applied to a particular pending case or to particular conduct that occurred before its enactment, Congress *explicitly* so provided. From the point of view of the Asian American community, the irony is that Congress explicitly provided that the 1991 Act was not applicable to a pending case that had been brought by a group of Asian Pacific American workers. Section 402(b) explicitly

provides that the Act shall not be applied to *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989). Although the Act was passed in part because of Congress's recognition that the *Wards Cove* decision "weakened the scope and effectiveness of Federal civil rights protections" (1991 Act § 2), the workers who had fought the *Wards Cove* case for twenty years were explicitly denied the Act's protections. While the *Wards Cove* exemption should certainly be repealed,³ its inclusion demonstrates that the Act should be applied to pending cases generally.

ARGUMENT

POINT I

THE PLAIN LANGUAGE OF THE 1991 ACT REQUIRES THAT IT BE APPLIED TO PENDING CASES

The plain language of the 1991 Act demonstrates that it should be applied to pending cases. First, Section 402(a) of the 1991 Act states that "[e]xcept as otherwise specifically provided, this Act and the amendments made by this Act shall take effect *upon enactment*." (Emphasis added). This language plainly provides for the 1991 Act to take effect immediately, and it gives "some indication that [Congress] believed that application of [the Act's] provisions was urgent." *Estate of Reynolds v. Martin*, 985 F.2d 470, 473 (9th Cir. 1993) (quoting *In re Reynolds*, 726 F.2d 1420, 1423 (9th Cir. 1984)). More-

³ The *Wards Cove* exemption is being attacked on both the legislative and judicial fronts. A bill to amend the 1991 Act by deleting Section 402(b) is pending in the House of Representatives. H.R. 1172, 103d Cong., 1st Sess., entitled "The Justice for *Wards Cove* Workers Act." The *Wards Cove* case is itself still being litigated in the Ninth Circuit, and some of the amici herein have argued that the *Wards Cove* exemption in the 1991 Act violates the Equal Protection Clause of the Constitution by singling out a group consisting primarily of Asian American workers and that it also violates the Separation of Powers Clause in that Congress has impermissibly attempted to control the outcome of a particular litigation. *Antonio v. Wards Cove Packing Co.*, Nos. 91-35306, 91-35861 (9th Cir.).

over, the language of Section 402(a) does not on its face exclude or carve out any exception for pending cases.

Second, when Congress did *not* want provisions of the 1991 Act to apply retroactively, it *explicitly* so provided. Thus, Section 402(b)—the *Wards Cove* exemption—declares that “nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983.”⁴ Likewise, Section 109(c) of the Act, which extends Title VII to United States citizens working for American companies abroad, states that it “shall not apply with respect to conduct occurring before the date of the enactment of this Act.”

When Sections 402(a), 402(b) and 109(c) are read together, it is clear that the “[e]xcept as otherwise specifically provided” language in Section 402(a) refers to Sections 402(b) and 109(c), for those are the “only provisions of the Act that can be read as specifically departing from the general rule.” *Estate of Reynolds*, 985 F.2d at 473. Hence, when read in the light of the 1991 Act as a whole, Section 402(a) can only mean that the Act *must* be applied to pending cases in general. Any other interpretation would render Sections 402(b) and 109(c) meaningless, thereby violating the basic tenet of statutory construction that a statute is not to be read so that any portion will be rendered superfluous. See *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 510 n.22 (1986) (“It is an ‘elementary canon of construction that a statute should be interpreted so as not to render one part inoperative’”) (quoting *Colautti v. Franklin*, 439 U.S. 379, 392 (1979)); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955).

Several courts have held that Sections 109(c) and 402(b) were intended merely as “insurance policies” to protect against retroactive application of the two provisions in the event that the courts were to determine that the 1991 Act as a whole was

to be applied to pending cases. *Gersman v. Group Health Ass’n, Inc.*, 975 F.2d 886, 890 (D.C. Cir. 1992); *Fray v. Omaha World Herald Co.*, 960 F.2d 1370, 1377 (8th Cir. 1992) (“retroactivity opponents ‘hedged their bets’ by expressly making specific provisions . . . prospective only”). Although the courts in *Gersman* and *Fray* acknowledged that Sections 109(c) and 402(b) would be rendered inoperative by a decision that the 1991 Act did not apply to pending cases, they reasoned that this was precisely what Congress intended.

The reasoning of the courts in *Gersman* and *Fray* should be rejected, for it undermines the long-standing principles of statutory construction set forth in *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. at 510 n.22. Moreover, as the Ninth Circuit recognized in *Estate of Reynolds*, 985 F.2d at 478, Sections 109(c) and 402(b) are not worded as mere “redundant assurances,” and if they were only intended to be “insurance policies,” they would have been worded differently. As the court observed:

If the statutory language of those sections read: “Notwithstanding any judicial construction concerning the retroactivity of this Act in general, this section shall not apply with respect to conduct occurring before the date of enactment of this Act,” we would have an entirely different case. But sections 402(b) and 109(c) as actually enacted simply do not read like insurance clauses.

985 F.2d at 478.

The Ninth Circuit recognized in *Estate of Reynolds* that some members of Congress probably voted in favor of Sections 402(b) and 109(c) with the belief that these sections would be construed by the courts as “insurance” clauses, and that other members probably voted for these sections with the belief that the language of these sections would compel the courts to find that the 1991 Act in general applied to pending cases. Given the “clear text of the Act,” the court held that those individual members’ beliefs are unimportant. 985 F.2d at 478. Regardless

⁴ The only case that fits this description, of course, is *Wards Cove*.

of the beliefs of individual members of Congress as to the desirability of applying the Act to pending cases, "the legislators as a body enacted a statute that, consistent with established principles of statutory construction, can only be read one way," *id.*, namely, in favor of application to pending cases.

Finally, the plain language of the 1991 Act should be construed in light of Supreme Court precedent requiring the liberal construction of civil rights laws, *Ford Motor Co. v. EEOC*, 458 U.S. 219, 226, 228, 233 n.20 (1982); *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 764 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975), which, as set forth at Point II, *infra*, supports the application of the 1991 Act to pending cases.

POINT II

THE PUBLIC POLICY CONSIDERATIONS STRONGLY SUPPORT APPLICATION OF THE 1991 ACT TO PENDING CASES

A. The Purposes of the 1991 Act

In the year prior to the enactment of the 1991 Act, Congress appointed a committee of lawyers and judges to study the Federal court system. The committee found that, because the remedies available to victims of employment discrimination were generally limited to backpay, the monetary stakes were often so small that, "even with the potential to recover attorneys fees, claimants sometimes find it difficult to litigate in Federal court because they cannot find counsel to take their cases." Steven A. Holmes, *Workers Find It Tough Going Filing Lawsuits Over Job Bias*, N.Y. Times, July 24, 1991, p. A1. As a result, individuals who have been denied employment opportunities on the basis of race or sex, or any other basis unlawful under Title VII, have been left without a remedy, and a legislative scheme that relies heavily on the work of "private attorneys general" has been hindered by the economic impediments to the vindication of federal statutory rights by individuals.

Thus, when it enacted the 1991 Act, Congress expressly found that additional remedies were needed both to provide victims of discrimination with additional protections against discrimination, and to enhance the effectiveness of the laws prohibiting discrimination in employment. Section 2 of the 1991 Act provides:

The Congress finds that—

(1) additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace; (2) the decision of the Supreme Court in *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989) has weakened the scope and effectiveness of Federal civil rights protections and; (3) legislation is necessary to provide additional protections against unlawful discrimination in employment.

As this Court has long made clear, Title VII is to be construed liberally to further its goals of eradicating discrimination in the workplace and making whole the victims of discrimination. *Ford Motor Co. v. EEOC*, 458 U.S. 219, 226, 228, 233 n.20 (1982); *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 764 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975). It was against the backdrop of this judicial precedent and the diminished effectiveness of the civil rights laws that Congress enacted the 1991 Act.

If the Court determines that the 1991 Act should not be applied to pending cases, victims of unlawful discrimination who succeed in proving unlawful conduct on the part of an employer will be deprived of the remedy Congress has determined is necessary to make victims of discrimination whole for their injuries. Even worse, victims of discrimination who, prior to this Court's decision in *Patterson*, chose to pursue their claims under 42 U.S.C. § 1981, rather than under Title VII, will find themselves with no remedy at all.

B. The Failure to Apply the 1991 Act To Pending Cases Will Leave Many Victims of Discrimination Without A Remedy

Prior to this Court's decision in *Patterson*, individuals who suffered discrimination on the basis of race in connection with an employment decision believed that they could choose between pursuing their claims under Title VII and pursuing their claims under 42 U.S.C. § 1981. If an individual chose the former, he or she would have had to comply with the administrative prerequisites of Title VII by filing a charge of discrimination with the EEOC within 180 (or 300) days of the challenged employment decision. 42 U.S.C. § 2000e-5(e). He or she then would have had to wait 180 days from the date on which the charge was filed to request that the EEOC issue a notice of right to sue. 42 U.S.C. § 2000e-5(f). Based on the pre-*Patterson* assumption that all claims of race discrimination in employment were actionable under 42 U.S.C. § 1981, many individuals chose simply to pursue their claims under 42 U.S.C. § 1981, either because they did not believe their claims could be resolved through the EEOC, or because they wished to recover compensatory damages previously unavailable under Title VII, or both. For those individuals who intended to pursue their claims through litigation, this choice not only implemented their individual preferences, but it also avoided the needless expenditure of EEOC resources, preserving those resources for those individuals who wished to attempt to resolve their claims administratively.

While the decision not to file a charge of discrimination with the EEOC meant foregoing their claims under Title VII, prior to *Patterson*, victims of race discrimination had no reason to worry about foregoing such claims, since a remedy was widely understood to be available under 42 U.S.C. § 1981. Unfortunately for those individuals who forbore pursuing their Title VII claims in reliance on that understanding and had actions pending at the time that *Patterson* was decided, that decision was applied retroactively, thereby not only depriving them of

the remedies available under 42 U.S.C. § 1981, but actually depriving them of *any* remedy whatsoever. These individuals will find themselves without any remedy for the unlawful discrimination to which they were subjected. The application of the 1991 Act to pending cases is necessary in order to enable individuals in these circumstances to vindicate their federal statutory rights.

In *Franklin v. Gwinnett County Public Schools*, 503 U.S. ___, 117 L. Ed. 2d 208, 218 (1992), the Court reiterated the general rule, derived from the English common law, that "all appropriate relief is available in an action brought to vindicate a federal right." While *Franklin* involved a federal statutory right as to which a private right of action was implied and, as to which, therefore, "Congress [had] given no indication of its purpose with respect to remedies," *id.*, the analysis set forth there is instructive. This analysis demonstrates the appropriateness of making the remedies set forth in the 1991 Act available to individuals who prevail in discrimination cases pending when the Act became law.

Franklin involved a claim by a high school student under Title IX of the Education Amendments of 1970, 20 U.S.C. §§ 1681-1688 ("Title IX"), challenging acts of sexual harassment committed by a teacher at the school. 503 U.S. at ___, 117 L. Ed. 2d at 215. Addressing the inadequacy of the traditional equitable remedies, including backpay, for a victim of sexual harassment who has not suffered a loss of wages, the Court held that monetary damages were available in order to avoid leaving such a victim "remediless." 503 U.S. at ___, 117 L. Ed. 2d at 223-24. The Court held,

[I]n this case the equitable remedies [backpay and prospective relief] suggested by respondent and the Federal Government are clearly inadequate. Backpay does nothing for petitioner, because she was a student when the alleged discrimination occurred. Similarly, because Hill—the person she claims subjected her to sexual harass-

ment—no longer teaches at the school and she herself no longer attends a school in the Gwinnett system, prospective relief accords her no remedy at all.

Franklin, 503 U.S. at ___, 117 L. Ed. 2d at 223. This analysis should guide the Court's decision with respect to the remedies that will be made available to victims of discrimination whose claims were pending when the Act was passed. If the Court holds that the Act does not apply to pending cases, many proven victims of unlawful discrimination will be left with inadequate remedies, and many others will be left "remediless."

C. Victims of Discrimination in Pending Cases Who Have Proven their Entitlement to Relief Under Title VII are Entitled to the Remedies Congress Made Available Through the 1991 Act

Plaintiffs in pending cases who succeed in proving unlawful discrimination in the terms and conditions of their employment should receive the benefit of all the remedies provided by Congress to make whole victims of discrimination. In analyzing the equitable powers of the courts to fashion a remedy under Title VII, this Court has stressed the remedial purposes of Title VII, and noted,

"[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."

Albemarle Paper Co. v. Moody, 422 U.S. at 419 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)). The Court has stated that,

Where racial discrimination is concerned, "the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future."

Albemarle Paper Co. v. Moody, 422 U.S. at 419 (quoting *Louisiana v. United States*, 380 U.S. 145, 154 (1965)). The Court's reasoning with regard to the scope of a court's equitable powers to effect the remedial purposes of Title VII explains why the remedies provided by Congress to "eliminate the discriminatory effects of the past" should not be withheld from individuals whose cases were pending at the time the 1991 Act was passed.

The goals of the federal laws prohibiting discrimination in employment, as recognized by this Court and as reiterated by Congress in Section 2 of the 1991 Act, should not be hindered by a reading of the Act that requires the cases pending at the time of its enactment be decided under the law that the 1991 Act was enacted to replace. In light of the principles requiring the liberal construction of civil rights laws in order to further their goals of eliminating unlawful discrimination, the Act should be applied to cases pending at the time of its enactment.

D. Employers Will Not Be Prejudiced Nor Will Manifest Injustice Result From Application of the 1991 Act to Pending Cases

In many of the cases addressing the applicability of the 1991 Act to pending cases, the issue turned on the application of the principles of law articulated by this Court in *Bradley v. Richmond School Board*, 416 U.S. 696 (1974), and *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988). For the reasons set forth in the briefs of petitioners and other amici, the *Bradley* decision should be applied in these cases. While those arguments will not be repeated here, two policy considerations should be emphasized.

First, the 1991 Act does not grant plaintiffs *additional* substantive rights; rather, its provisions simply augment the procedures by which plaintiffs may vindicate pre-existing rights. See *Denver and Rio Grande Western Railroad Co. v. Brotherhood of Railroad Trainmen*, 387 U.S. 556, 563 (1967) (holding that an act that did not change "substantive law" but only

affected "procedure" would be applied to cases pending when the act was enacted because " 'no one has a vested right to any given procedure' (citation omitted)". This is particularly true with respect to the provisions of the 1991 Act allowing the right to a jury trial and compensatory and punitive damages. *Bridges v. Eastman Kodak Co.*, 800 F. Supp. 1172, 1177 (S.D.N.Y. 1991) (Carter, J.) ("The jury trial and damages provisions of the [1991 Act] at issue here do not grant plaintiffs additional substantive rights, but rather are more aptly described as augmenting the procedures by which plaintiffs may vindicate their pre-existing substantive rights."); *Wisdom v. Intrepid Sea-Air-Space Museum*, No. 91 Civ. 4439, 1992 U.S. Dist. LEXIS 9424 * 21-22 (S.D.N.Y. 1992) (Patterson, J.) (appeal pending); *Jackson v. Bankers Trust Co.*, No. 88 Civ. 4786, 1992 U.S. Dist. LEXIS 6290 * 18 (S.D.N.Y. 1992) (Martin, J.); *Croce v. V.I.P. Real Estate*, 786 F. Supp. 1141, 1148 (E.D.N.Y. 1992) (Spatt, J.) (rejecting employer's argument that it had "a matured or unconditional right to be limited in exposure to only certain types of damages that flow from proscribed conduct"). This is also true with respect to the Section 101 of the 1991 Act, which reversed the limits on the scope of 42 U.S.C. § 1981 created by *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), since conduct that is unlawful under Section 101 of the Act is already unlawful under Title VII. By permitting victims of race discrimination in employment to seek relief under 42 U.S.C. § 1981, the 1991 Act simply provides such victims with an alternative to Title VII and with remedies not previously available under Title VII.

Second, application of the 1991 Act to pending cases would *not* alter any of the existing rights of employers, for under existing law employers did not have any "right" to a bench trial or to be free from liability for punitive or compensatory damages. *Wisdom v. Intrepid Sea-Air-Space Museum*, No. 91 Civ. 4439, 1992 U.S. Dist. LEXIS 9424 at * 22 ("Defendant never had a vested or unconditional right to violate federal anti-discrimination laws."); *Jackson v. Bankers Trust Co.*, 88 Civ.

4786, U.S. Dist. LEXIS 6290 at ** 18-19 ("it cannot be said that requiring the defendant to submit to a jury trial and subject itself to expert fees and punitive damages alters any of defendant's existing rights"); *Croce v. V.I.P. Real Estate*, 786 F. Supp. at 1148 ("The prospect of a defendant facing a jury trial in lieu of a bench trial, or potential compensatory damages where none previously existed, simply does not impact on 'existing rights'."). See also *EEOC v. Vucitech*, 842 F.2d 936, 942 (7th Cir. 1988) ("Prospective-only application of the Pregnancy Discrimination Act would leave some of the Act's intended beneficiaries without remedy, while retroactive application would neither injure innocent third parties nor be inequitable to defendants . . .").

While some courts have held that the availability of new remedies for conduct that has been unlawful at least since the enactment of Title VII implicates the existing rights of employers, e.g., *Luddington v. Indiana Bell Telephone Co.*, 966 F.2d 225, 229 (7th Cir. 1992), this reasoning should be rejected, for it translates into a suggestion that an employer might *not* have discriminated had it known that it would be subject to a jury trial and compensatory and punitive damages—that employers might have acted differently had they known that the "cost" of discrimination would include not just backpay but also compensatory and punitive damages. Discrimination in employment has been absolutely prohibited by Federal law since 1964, however, and employers should not be permitted to put a price on discrimination. This Court should reject the view that employers have a vested right to discriminate under a "cost-benefit analysis." *Jackson v. Bankers Trust Co.* No. 88 Civ. 4786, 1992 U.S. Dist. LEXIS 6290 at * 20 (S.D.N.Y. 1992) (Martin, J.) ("the Court will not sanction any stance that employers have a right to discriminate under a cost-benefit analysis").

Significantly, other civil rights statutes have been held to be applicable to cases pending at the time of their enactment. See, e.g., *United States v. Alabama*, 362 U.S. 602 (1960) (Civil

Rights Act of 1960); *Littlefield v. McGuffey*, 954 F.2d 1337 (7th Cir. 1992) (amendment to Fair Housing Act removing cap on punitive damages); *United States v. Marengo County Comm'n*, 731 F.2d 1546 (11th Cir. 1984) (amendments to Voting Rights Act); *Adams v. Brinegar*, 521 F.2d 129, 130 (7th Cir. 1975) (1972 amendments to Title VII); *Koger v. Ball*, 497 F.2d 702 (4th Cir. 1974) (same). Likewise, outside of the civil rights area, courts have also applied statutory changes to pending cases. See, e.g., *Kirkbride v. Continental Casualty Co.*, 933 F.2d 729 (9th Cir. 1991) (savings and loan); *FDIC v. 232, Inc.*, 920 F.2d 815 (11th Cir. 1991) (same); *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497 (6th Cir. 1989), *cert. denied*, 494 U.S. 1057 (1990) (environmental); *United States v. O'Connell*, 890 F.2d 563 (1st Cir. 1989) (False Claims Act); *United States v. Pani*, 717 F. Supp. 1013, 1017 (S.D.N.Y. 1989) (False Claims Act). See also *Pension Benefits Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984) (Multiemployer Pension Plan Amendments Act of 1980). There is simply no reason to distinguish the 1991 Act from other civil rights statutes or from other statutes such as the False Claims Act or the environmental laws or the savings and loan statutes.

Ultimately, the key in determining whether a statute should be applied to pending cases is whether "manifest injustice" would result. *Bradley*, 416 U.S. at 711; see *FDIC v. Wright*, 942 F.2d 1089, 1095 n.6 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1937 (1992) ("Any tension between [*Bowen* and *Bradley*] is negated because, under *Bradley*, a statute will not be deemed to apply retroactively if it would threaten manifest injustice by disrupting vested rights."). No vested rights would be disrupted by the application of the 1991 Act to pending cases. On the other hand, "manifest injustice" will surely result if victims of employment discrimination—who have been subjected to unfair, adverse treatment in the terms of their employment simply because of their sex or race—are left with remedies that Congress has acknowledged are wholly inadequate, or, if they are left with no remedy at all.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the briefs of petitioners and other amici in support of petitioners, the decisions of the Fifth and Sixth Circuits should be reversed.

Dated: New York, New York
April 30, 1993

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APPENDIX

STATEMENTS OF AMICI CURIAE

The National Asian Pacific American Legal Consortium, Inc. ("NAPALC") was created in 1992 to promote, advance, and represent the legal and civil rights of the Asian and Pacific Islander communities through collaborative efforts and the formation of a national legal structure that pursues litigation, advocacy, education, and public policy development. NAPALC is comprised of three organizations dedicated to the protection of civil rights of Asian and Pacific Islanders: the Asian American Legal Defense and Education Fund ("AALDEF"), the Asian Law Caucus, Inc. ("ALC"), and Asian Pacific American Legal Center of Southern California ("APALC").

AALDEF is a not-for-profit civil rights organization that addresses critical issues facing Asian Americans through community education, advocacy and litigation. AALDEF's program priorities include the elimination of anti-Asian violence, immigrant rights, voting rights, employment and labor rights, and redress for Japanese Americans incarcerated in camps in the United States during World War II.

ALC is a non-profit, public interest legal organization whose mission is to promote, advance, and represent the legal and civil rights of the Asian and Pacific Islander communities. Since 1972, the ALC has provided free or low-cost multilingual legal services and community education in the areas of immigration, housing, employment and labor, and civil rights.

APALC is a non-profit legal organization dedicated to serving the Asian and Pacific Islander communities through direct legal services, community education, leadership development, and advocacy. Founded in 1983, APALC provides multilingual, culturally sensitive legal and education services, with programs focusing on immigration, family law, language

rights, inter-ethnic relations, dispute resolution, and civil rights advocacy.

The National Asian Pacific American Bar Association ("NAPABA") is a nationwide, non-profit, non-partisan organization of Asian Pacific American attorneys. Founded in 1989, NAPABA has over 3,000 members and is dedicated to serving the needs of Asian Pacific American attorneys and their communities. NAPABA was involved in efforts leading to the passage of the 1991 Act.

The Asian Pacific American Labor Alliance, AFL-CIO ("APALA"), is non-profit labor organization founded in 1992 to, among other things: (1) defend and advocate for the civil and human rights of Asian Pacific Americans, immigrants and all people of color; and (2) provide a vehicle within our society for the concerns of all Asian Pacific American workers. APALA is the first national Asian Pacific American labor organization in American history.

The Chinese American Citizens Alliance ("CACA") is a national civil rights organization established since 1895 dedicated to the promotion and protection of equal rights for all Chinese Americans. It is membership supported and conducts legislative advocacy, youth development, and community awareness and participation activities on national, state and local levels.

The Organization of Chinese Americans, Inc. ("OCA") is a non-profit, non-partisan advocacy organization that was founded in 1973. As one of the nation's oldest Asian American civil rights organization, OCA seeks to secure social justice, equal opportunity, and equal treatment of Chinese Americans and Asian Americans; and to eliminate prejudices and ignorance about Chinese Americans and Asian Americans.

JUL 03 1993

OFFICE OF THE CLERK

By The
Supreme Court of the United States
October Term 1992

BARBARA LANDGRAF,

Petitioner,

USE FILM PRODUCTS, BONAR PACKAGING, INC.
and QUANTUM CHEMICAL CORPORATION,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

MAURICE RIVERS and ROBERT C. DAVISON,
Petitioners,

ROADWAY EXPRESS, INC.,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

BRIEF FOR MIDWEST MOTOR EXPRESS, INC.
AND AMICO CURTAIN IN SUPPORT OF RESPONDENTS

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Senate Comm. on Education and Labor, <i>Comparison of S. 2926 and S. 1958</i> , 74th Cong., 1st Sess., 21-22 (1935), reprinted in <i>A Legislative History of the National Labor Relations Act, 1935</i> , pp. 1319, 1346 (1985 Reprint, U.S. Government Printing Office)	15
Smead, <i>The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence</i> , 20 Minn. L. Rev. 775 (1936)	passim

IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-757

BARBARA LANDGRAF,
v. *Petitioner.*

USI FILM PRODUCTS, BONAR PACKAGING, INC.
and QUANTUM CHEMICAL CORPORATION,
Respondents.

**On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit**

No. 92-938

MAURICE RIVERS and ROBERT C. DAVISON,
v. *Petitioners,*

ROADWAY EXPRESS, INC.,
Respondent.

**On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit**

**BRIEF FOR MIDWEST MOTOR EXPRESS, INC.
AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS**

INTEREST OF THE *AMICUS CURIAE*

Midwest Motor Express, Inc. ("Midwest") is an interstate motor carrier of freight located in Bismarck, ND, operating in nine states. Midwest's interest stems from likely legislation pending in Congress that would create another retroactive application problem identical to the one under the Civil Rights Act of 1991 now before this Court. Enactment of such legislation without a clear-cut *prospective* effective date would expose Midwest to serious threat of injury. Therefore, *amicus* seeks resolution by this Court of the apparently conflicting precedents on retroactive application of federal civil legislation.

Since August 12, 1991, Midwest has been engaged in a labor dispute with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Teamsters"), within the meaning of the Norris-LaGuardia Act (29 U.S.C. § 111(c)), and the National Labor Relations Act ("NLRA") (29 U.S.C. § 152(9)), as applied to the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA") (29 U.S.C. § 1398).¹ Nevertheless, not unlike the instant appeals under the Civil Rights Act of 1991, a proposed amendment to the NLRA threatens to turn Midwest's past legal actions into illegal ones—by retroactive application of a new law.

Legislation has been introduced in Congress to amend the NLRA (H.R. 5 and S. 55) which contains no effective date concerning when an employer may be prohibited from hiring permanent replacement workers during eco-

¹ The Teamsters struck Midwest on August 12, 1991, after negotiations over a new contract reached an impasse. Following commencement of the strike, the parties resumed bargaining with the assistance of a federal mediator, which bargaining has continued to the date of this brief without settlement. During the course of this labor dispute, Midwest has continued to operate only by hiring permanent replacements as it is permitted to do under current federal law.

omic (wage and benefit) strikes. The relevant identical language of H.R. 5 and S. 55 is excerpted and attached as Appendix A. Consequently, if that legislation passes as currently drafted,² and if this Court now fails to resolve the apparent conflict between *Bradley v. School Board of the City of Richmond*, 416 U.S. 696 (1974) and *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), Midwest expects that controversy and confusion similar to that engendered by the retroactive application of the Civil Rights Act of 1991 will occur. Such confusion is likely to result in serious adverse harm to Midwest's business and could subject it to unfair labor practice charges and/or costly state litigation. *See infra* at 13-17. The mere prospect of these occurrences is jeopardizing Midwest's ability to remain in business.

Accordingly, *amicus* has a vital interest in the resolution of the issues raised in this case. *Amicus* believes it will bring insights and information beyond what is presented by Petitioners and Respondents, which will be useful to the Court in deciding the issues presented.³

STATEMENT

These cases involve contradictory principles governing the prospective application of civil laws, which conflict this Court so far has been reluctant to resolve. Although the principle of prospectivity dates to the Greeks and Romans,⁴ it has not always been followed by this Court.

² H.R. 5 and S. 55 were introduced in the Senate and the House of Representatives in January 1993. H.R. 5, 103rd Cong., 1st Sess., § 1, 139 Cong. Rec. H82, (daily ed. Jan. 5, 1993); S. 55, 103rd Cong., 1st Sess., § 1, 139 Cong. Rec. S191, (daily ed. Jan. 21, 1993). House and Senate floor action is eminent, and the Clinton Administration has endorsed the legislation as drafted. *Fairness in the Workplace: Restoring the Right to Strike: Hearing on S. 55 Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources*, 103rd Cong., 1st Sess. (March 30, 1993) (statement of Robert B. Reich, Secretary of Labor).

³ This brief is filed with the written consent of the parties. The letters of consent have been filed with the Clerk of Court.

⁴ As begins the seminal work on the rule against retroactivity: "The bias against retroactive laws is an ancient one." Smead,

At the heart of the dispute is this Court's holding that a court is to apply the law in effect at the time it makes its decision, unless doing so would result in "manifest injustice" or there is statutory direction (or legislative history) to the contrary. *Bradley*, 416 U.S. at 711. On the other hand, this Court more recently reaffirmed that "[R]etroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have effect unless their language requires this result." *Bowen*, 488 U.S. at 208.

There is a compelling reason for this Court to clarify its position and to adopt a bright-line, common-sense ruling based on *Bowen*. As Justice Scalia urged in *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 110 S. Ct. 1570, 1579 (1990) (Scalia, J., concurring), this Court should overrule *Bradley* and reaffirm the clear intent rule, since retroactive application is "never sought (or defended against) except as a means of 'affecting substantial rights and liabilities,'" and even procedural changes applied retroactively alter such rights. *Id.* at 1585. Thus, this Court should heed Justice Scalia's warning that "manifest injustice" is "just a surrogate for policy preferences" and that justice can mean "whatever other policy motivation might make one favor a particular result." *Id.* at 1587.

Failure to resolve this conflict will lead to continued examples of congressional recklessness, as demonstrated by the instant cases under the Civil Rights Act of 1991.⁵ Midwest contends that the same result will occur in

The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence, 20 Minn. L. Rev. 775, 776-85 (1936).

⁵ Only controversy, confusion, and expensive and protracted litigation has resulted when Congress deliberately leaves the effective date issue unresolved, as it did in the Civil Rights Act of 1991. As of mid-1992, 49 federal courts had ruled against retroactivity and 35 had ruled in favor of it. See Marcus, *A Percolating Legal Dispute on Civil Rights*, The Washington Post, April 17, 1992, at A21.

federal striker replacement and other legislation, unless the cardinal rule upheld in *Bowen* is reaffirmed.

SUMMARY OF ARGUMENT

Respondents ask this Court to affirm the decisions by the Fifth and Sixth Circuits that the Civil Rights Act of 1991 does not apply retroactively. In support, Midwest submits that the judicial chaos surrounding the retroactive application of legislation is the result of a dramatic departure from the historical rule against retroactivity.

Whether *Bradley* and *Bowen* can co-exist on a highly theoretical basis is, at best, debatable. See *infra* note 10 and accompanying text. In practice, however, clarifying the existing confusion necessarily depends on rejecting the irreconcilable precept which *Bradley* has been held to support that it is *not* unjust, in most cases, to apply new civil legislation retroactively.

The Supreme Court must find *Bradley* is applied wrongly as a "presumption" in favor of retroactivity whenever a new liability altering the position of private litigants and parties is involved, whether substantive or procedural rights are implicated. See Kahn, *Completed Acts, Pending Cases, and Conflicting Presumptions: The Retroactive Application of Legislation After Bradley*, 13 George Mason Univ. L. Rev. 231, 239-40 (Winter 1990). To this extent, the Supreme Court should overrule *Bradley* and reaffirm the long-standing rule of statutory construction that federal civil legislation only applies prospectively, unless there is a clear legislative intent to the contrary. Ambiguity—either intentional or unintentional—must be resolved in favor of the prospective application of legislation.

Moreover, Petitioners' interpretation of *Bradley* represents a blatant departure from the fundamental principles of fairness inherent in the clear intent rule upheld in *Bowen*. Accordingly, Petitioners' analysis stands wholly outside of the implicit constitutional and relevant policy factors which this Court must weigh in deciding these

cases. Under Petitioners' view, judicial review, Congress' role, and fairness each is undermined.

First, Petitioners erroneously assume that Respondents have acted wrongly in order to argue that Respondents have no "vested right to do wrong." *Rivers v. Roadway*, Pet. Brf. at 29; *Landgraf v. USI Film Products*, Pet. Brf. at 31. Second, Petitioners unpersuasively argue that the plain meaning of the Civil Rights Act of 1991 demonstrates a clear congressional intent to apply the law retroactively. Third, Petitioners move beyond the pale and assert that, under *Bradley*, any law (whether procedural or substantive) must be presumed retroactive based upon whatever label, political spin or policy preference the prevailing members of Congress place on the law, regardless of its effect on private parties or "what the original statute actually meant." *Rivers v. Roadway*, Pet. Brf. at 38. In Petitioners' view, if Congress labels a statute remedial or restorative, there is no room for judicial scrutiny.⁶ *Landgraf v. USI Film Products*, Pet. Brf. at 29-33; *Rivers v. Roadway*, Pet. Brf. at 35-39. This Court must reject each of these specious arguments.

Rather than merely a judicial preemption useful in interpreting ambiguous legislation, *Bowen* moreover, represents the cardinal rule of statutory construction in determining the retroactive application of legislation. By clarifying *Bowen* as such, this Court will preserve the appropriate burdens and roles of the legislature and the judiciary, including the historical and proper role of judicial review as a check on the power of the legislature unfairly to render laws retroactive.

⁶ Ironically, the one type of law historically not forbidden by the American principle of prospectivity was the "curative" law validating past acts that otherwise would have been void. But even curative laws that impaired vested rights or otherwise worked an injustice to parties were condemned by the American principle. See Smead at 786, n.36.

ARGUMENT

I. THE PRINCIPLE UPHELD IN *BOWEN* REPRESENTS THE CARDINAL RULE OF STATUTORY CONSTRUCTION GOVERNING THE RETROACTIVE APPLICATION OF FEDERAL CIVIL LEGISLATION

As Justice Scalia's concurring opinion in *Bonjorno* reveals, the principle that laws and customs should apply only to future transactions unless expressly stated that they apply either to past conduct or to pending transactions dates to the Greeks and Roman law. *Bonjorno*, 110 S. Ct. at 1586; *Fray v. Omaha World Herald Co.*, 960 F.2d 1370, 1374 (8th Cir. 1992). The principle, originally one of "natural law" which became a legal maxim under English law, was applied as a rule of statutory construction, and so found its way into American law.⁷ In the United States, however, largely as a result of judicial review, this rule of statutory construction was combined with the concept of "vested rights" and "justice" to become a part of the concept of justice and a limitation on legislative power.⁸ See Smead at 776-85.

Thus, the American principle of prospectivity has operated to protect vested rights by invalidating or narrowing the application of statutes that might have applied retrospectively. These included statutes that expressly

⁷ As in England, retroactive American laws were held to be oppressive and unjust, and it was maintained that the essence of law was that it be a rule for the future. Smead at 780, n. 21.

⁸ In addition to being a rule of statutory construction in American law, the American courts added a judicial limitation on the constitutional ability of a legislative body to alter pre-enactment rights and conduct. Judicial scrutiny is an important component of the American constitutional system which controls legislative behavior. See, e.g., *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 14-20 (1976). See also DeMars, *Retrospectivity and Retroactivity of Civil Legislation Reconsidered*, 10 Ohio Northern L. Rev. 253 (1983).

were enacted to take effect from a time prior to their passage, as well as statutes that were to operate from the time of their passage, but affected vested rights and past transactions.⁹ See Smead at 781-787, n.35. The fundamental notion has been and should be that, in most cases, it is unjust to apply new civil legislation retrospectively.

The rule against retroactivity thus embodies American constitutional notions of fairness and due process. Today, these factors must be considered by Congress and the courts in determining the validity of civil legislation which Congress explicitly makes retroactive. See, e.g., *Pension Benefit Guaranty Corp. v. R. A. Gray & Co.*, 467 U.S. 717 (1984) (rejecting a Fifth Amendment due process challenge to a federal statute that retroactively imposed liability on employers who withdrew from multiemployer pension plans); *Turner Elkhorn*, 428 U.S. 1.¹⁰ There-

⁹ The prohibition included retrospective laws as defined by Mr. Justice Story in *Society for the Propagation of the Gospel in Foreign Parts v. Wheeler*, (1814) 2 Gall. C.C. 105:

. . . . Upon principle, every statute, which takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past, must be deemed retrospective. . . .

¹⁰ The Supreme Court has found the rational basis standard to be equivalent to the standard applied in *Welch v. Henry*, 305 U.S. 134, 147 (1938), where the Court held that a retroactive tax was constitutional unless its application was so "harsh and oppressive" as to violate due process. *R.A. Gray*, 467 U.S. at 733. This standard requires that there be a rational connection between the legislation's purpose and its retroactive effect. It is consistent with the rule against the retroactive application of legislation where Congressional intent is not explicit or clear. In the latter case, a statute need not be invalidated, but simply applied prospectively.

Arguably, the *Bradley* presumption in favor of retroactivity absent "manifest injustice" arose from cases in which retroactivity was explicit or clearly intended but "injustice" resulted. See *Bonjorno*, 110 S. Ct. at 1584. Theoretically, in this very limited context, *Bradley* remains viable. See also *Fray*, 960 F.2d at 1374 (*Bradley* did not "silently sweep away the traditional principle").

fore, when Congress makes a statute expressly retroactive, presumably it has reviewed these considerations and has resolved the inherent tensions involving fundamental fairness.

Accordingly, it is incongruous to suggest that legislation *not* explicitly made retroactive should be presumed to be retroactive, and then reviewed perfunctorily based upon a standard (such as Petitioners' conclusory remedial scheme), that ignores the fundamental issue of fairness which is the cornerstone of the historical rule of statutory construction against retroactivity. See DeMars at 264-272 (because the vested rights—remedial scheme approach utilizes analytically conclusive terms, it does not lead a court to consider the question of fairness which is also basic to the issue of statutory retrospectivity).

In particular, as with the Civil Rights Act of 1991, where Congress considered and rejected explicit retroactive application *and* failed to reach a consensus on its intent, after reviewing the requisite constitutional considerations, no finding of retroactivity is justified or should be compelled. See *infra* at 10-12.

Therefore, Midwest submits that the rule reiterated in *Bowen* is not only that prospectively must be upheld in the absence of clear intent, but further, that prospectivity must govern in determining clear intent when retroactivity is not explicit. Thus, to the extent that *Bradley* establishes a presumption in favor of retroactivity in the absence of clear intent or in determining clear intent, *Bradley* is wrong and should be overruled.

Accordingly, Midwest urges this Court to find that the cardinal rule of statutory construction in determining the retroactive application of federal civil legislation is the principle (and not merely the "presumption") that legislation must be applied prospectively, unless Congress specifically provides to the contrary. See Smead at 781 n.22; *U.S. v. Magnolia Petroleum Co.*, 276 U.S. 160, 162 (1928) ("statutes are not to be given retroactive

effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose to do so plainly appears"). *But see Ludington v. Indiana Bell Telephone*, 966 F.2d 225, 228 (7th Cir. 1992), *petition for cert. pending*, No. 92-977 (*dictum*) (prospectivity "is resolved, but not all the way" because we are "speaking only of a presumption" against retroactivity). Only in concert with this paramount rule, can ancillary rules of construction utilized by the courts to determine statutory meaning and legislative intent (i.e., plain meaning) effectively operate without injury to the historical notions of fairness and justice upon which the principle is based.

II. BOWEN PRECLUDES THE RETROACTIVE APPLICATION OF NEW FEDERAL CIVIL LEGISLATION, SUCH AS THE CIVIL RIGHTS ACT OF 1991, WHERE NO CONGRESSIONAL INTENT IS CLEAR

The express retroactive provisions of the Civil Rights Act of 1990 stirred much debate and disagreement as Congress grappled with concerns of fairness and constitutionality.¹¹ President Bush vetoed the 1990 act,¹² and Congress failed to override the veto. 136 Cong. Rec. S16,589 (daily ed. Oct. 22, 1990). In 1991, the bill's sponsors dropped the express retroactive provisions in order to gain acceptance and, instead, inserted language providing that "the amendments made by this Act shall

¹¹ See, e.g., H.R. 4000, The Civil Rights Act of 1990; *Joint Hearing: Before the Comm. on Education and Labor and the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 101st Cong., 2d Sess. (1990); Civil Rights Act of 1990: *Hearing Before the Senate Comm. on Labor and Human Resources on S. 2104*, 101st Cong., 1st Sess. (1989).

¹² President's Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 26 Weekly Comp. Pres. Doc. 1632-34 (Oct. 22, 1990), *reprinted in* 136 Cong. Rec. S16,457, S16,458 (daily ed. Oct. 24, 1990).

take effect upon enactment."¹³ § 402 (a), 105 Stat. 1099. Arguably, this language explicitly states that the Act applies prospectively. Alternatively, the inference of Congress' action is that prospectivity is intended. See e.g., *National Woodwork Manufacturers Ass'n v. NLRB*, 386 U.S. 612, 640 (1967).

Because of its contradictory legislative history, however, the 1991 provision leaves open whether the law applies retroactively to cases pending on the date of enactment or whether the law applies only prospectively to future cases.¹⁴ Clearly, the Act was passed without agreement on the issue, and apparently various members of Congress hoped this Court would resolve the known conflicting legal authorities in *Bradley* and *Bowen* in their favor. Congress thereby intentionally left its meaning unresolved. Thus, Petitioners' argument that the plain meaning of the Civil Rights Act of 1991 compels retroactivity fails. See *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363, 1372-1373 (5th Cir. 1992).

In *Bonjorno*, the Supreme Court simply reaffirmed that "where the congressional intent is clear, it governs." *Bonjorno*, 110 S. Ct. at 1577. But enactment of an ambiguous statute such as the Civil Rights Act of 1991,

¹³ On November 21, 1991, President Bush signed the Civil Rights Act of 1991. Pub. L. No. 102-166, 105 Stat. 1071 (1991). In addition to reversing several Supreme Court decisions, the Act made substantial substantive and procedural changes including changes in adjudicator (jury) and damages (compensatory and punitive damages).

¹⁴ See 137 Cong. Rec. S15,483, S15,485 (daily ed. Oct. 30, 1991) (interpretive memorandum submitted by Sen. Danforth, the bill's Republican sponsor, arguing against retroactivity); 137 Cong. Rec. S15,472, S15,478 (daily ed. Oct. 30, 1991) (interpretive memorandum submitted by Sen. Dole arguing against retroactivity); 137 Cong. Rec. S15,485 (daily ed. October 30, 1991) (interpretive memorandum by Sen. Kennedy, the bill's Democratic sponsor, arguing for retroactivity by characterizing the law as a "restoration of a prior rule"). Notably, no sponsor characterized the legislation as merely procedural or remedial.

or a *silent* statute such as the proposed federal striker replacement legislation, can defy any meaningful attempt to discern congressional intent. Under these circumstances, the historical constitutional underpinnings of American law require that *Bowen* prevail as the cardinal rule of statutory construction, not merely as "presumption" to be utilized in deciding among competing policy considerations. In effect, reaffirming the *Bowen* clear intent rule would ensure that, in the future, Congress will deliberate and provide clear intent on the retroactive application of any legislation that contains potential constitutional and fairness concerns.¹⁵ Therefore, because nothing in the Civil Rights Act of 1991, or its legislative history, expresses a clear congressional mandate requiring retroactive application, the statute must not apply to pending cases.¹⁶

¹⁵ While the clear intent rule does not require that Congress make explicit its intent to apply a statute retroactively, it does require that Congress make its intent clear. *Bonjorno*, 110 S. Ct. at 1577. Hence, the cardinal rule against retroactivity may be superseded only by express statutory language or by implication when the statute "requires" it, i.e., when limiting the statute to prospective application would render it completely ineffective by defeating its entire purpose. See e.g., *United States v. Northeastern Pharmaceutical & Chem. Co., Inc.*, 810 F.2d 726, 733 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987) (in order to be effective, CERCLA had to reach past conduct).

¹⁶ Not surprisingly, the large majority of circuit courts have applied the *Bowen* "presumption" against retroactivity finding no clear expression of legislative intent to the contrary. See *Lehman v. Burnley*, 866 F.2d 33, 37 (2nd Cir. 1989); *Davis v. Omitowoju*, 833 F.2d 1155, 1170-1171 (3rd Cir. 1989); *Leland v. Federal Ins. Adm'n.*, 934 F.2d 524, 528-529 (4th Cir.), *cert. denied*, 112 S. Ct. 417 (1991); *Storey v. Shearson-American Exp.*, 928 F.2d 159, 161-162 (5th Cir. 1991); *Vogel v. City of Cincinnati*, 959 F.2d 594, 597-598 (6th Cir. 1992); *Mozee v. American Commercial Marine Serv. Co.*, 963 F.2d 929, 936 (7th Cir.), *cert. denied*, 113 S. Ct. 207 (1992); *Simmons v. A.L. Lockhart*, 931 F.2d 1226, 1230 (8th Cir. 1991); *DeVargas v. Mason and Hanger-Silas Mason Co. Inc.*, 911 F.2d 1377, 1392 (10th Cir. 1989), *cert. denied*, 111 S. Ct. 799 (1991); *Gersman v. Group Health Ass'n*, 975 F.2d 886, 900 (D.C. Cir. 1992); *Wagner Seed Co. v. Bush*, 946 F.2d 918, 924 (D.C.

III. THE RETROACTIVE APPLICATION OF LEGISLATION, SUCH AS THE CIVIL RIGHTS ACT OF 1991, WHICH CREATES NEW LIABILITIES AND DUTIES BEYOND RESTORATIVE LAW, RESULTS IN STAGGERING REAL WORLD CONSEQUENCES

The Civil Rights Act of 1991 significantly expands both 42 U.S.C. Section 1981 and Title VII of the Civil Rights Act of 1964 to include new causes of action as well as new classes of plaintiffs. The enhanced remedies for intentional discrimination under Title VII in effect create new liabilities for sexual harassment in situations that do not involve tangible job detriments, such as "hostile environment" cases in which the plaintiff suffered no specific adverse employment action that resulted in economic harm. Monetary damages were never available before in such cases under Section 1981 or Title VII. Rights under Section 1981 are extended to post-formation contractual relationships. In effect, conduct insufficient to impose *liability* on employers before the Act was passed, may now be enough to result in a finding of discrimination against those same employers. Coil and Weinstein, *Past Sins or Future Transgressions: The Debate Over Retroactive Application of the 1991 Civil Rights Act*, 18 Employee Relations Law Journal 5, 6 (1992); see e.g., *Baynes v. AT&T Technologies, Inc.*, 976 F.2d 1370, 1374-1375 (1992); *Luddington*, 966 F.2d at 229.

Nevertheless, Petitioners argue that the Civil Rights Act of 1991 affects only procedure or remedies, and thus should be applied retroactively.¹⁷ In addition to precluding a meaningful analysis of fairness, a key problem with this approach is that the label applied to a particular

Cir. 1991), *cert. denied*, 112 S. Ct. 1584 (1992); *Alpo Pet Foods, Inc. v. Ralston Purina Co.*, 913 F.2d 918, 922-923 (Fed. Cir. 1990).

¹⁷ If Congress had, in fact, intended *only* to restore prior law or to provide remedial rights that did *not* create new liabilities, Midwest submits it could have written language to achieve that limited result. See *Johnson*, 965 F.2d 1363.

change may not reflect whether the change alters substantive rights or conduct. The label becomes a "policy" tool for proponents of retroactive legislation. See *Bonjorno*, 110 S. Ct. at 1585.

Petitioners also argue that, because one purpose of the Civil Rights Act of 1991 was Congress' intent to overturn recent Supreme Court decisions on discreet employment law issues, retroactivity must be presumed. See *Rivers v. Roadway*, Pet. Brf. at 35-39. While a few courts, grappling with the conflict between *Bradley* and *Bowen*, have held that retroactive application of a new law is appropriate where Congress clearly intended to overrule recent case law and restore the law to its former state, other courts reject this approach as too speculative. See *Mojica v. Gannett Co.*, 779 F. Supp. 94, 97 (N.D. Ill. 1991) (retroactive application of the Civil Rights Act of 1991 upheld in part on the basis that the Act was meant to "restore" prior law); but see *DeVargas*, 911 F.2d at 1387. By reaffirming *Bowen* as the cardinal rule of statutory construction against retroactivity, this Court would eliminate the expansive dangers inherent in Petitioners' approach. Only prospective application of a new law would be appropriate, absent a clear congressional intent to apply a statute retroactively in order to restore recent prior law.

The potential unfair application of likely federal striker replacement legislation to Midwest's ongoing labor dispute starkly demonstrates the absurdity of Petitioners' position. Under Petitioners' interpretation of *Bradley*, the mere conclusory characterization (albeit erroneous) of federal striker replacement legislation as "restorative" would result in the retroactive application of legislation to Midwest.¹⁸

¹⁸ Proponents of H.R. 5 and S. 55 are characterizing the legislation as "restorative law" designed to overturn the Supreme Court's decisions in *NLRB v. Mackay Radio and Telegraph Co.*,

This result could require the National Labor Relations Board ("NLRB") to find that Midwest retroactively committed an unfair labor practice by hiring some permanent replacements after August 12, 1991 under the newly amended law.¹⁹ See Attachment A for proposed language of H.R. 5 and S. 55 adding 29 U.S.C. § 158(a)(6). Moreover, such a result could turn the current labor dispute on its head by converting the Teamsters strike against Midwest from an economic strike into an unfair

304 U.S. 333 (1938), and *Trans World Airlines v. Independent Federation of Flight Attendants*, 109 S. Ct. 1225 (1989). See note 2 *supra*, at 3. The legislative history of the NLRA conclusively refutes this position and demonstrates that the changes sought by H.R. 5 and S. 55 would alter the long-standing legal right of an employer to permanently replace economic strikers affirmed under the NLRA. The legislative history of the Wagner Act of 1935 (the original NLRA) preserved the right of an employer to hire replacements, whether permanent or temporary. Although the Wagner Act did not address the issue directly, a U.S. Senate Education and Labor Committee memorandum regarding the Wagner bill states:

[The bill] provides that the labor dispute shall be "current," and the employer is free to hasten its end by hiring a new permanent crew of workers and running the plant on a normal basis The broader definition of "employee" in [the bill] does not lead to the conclusion that no strike may be lost or that an employer may not hire new workers, temporary or permanent, at will.

See Senate Comm. on Education and Labor, *Comparison of S. 2926 and S. 1958*, 74th Cong., 1st Sess. 21-22 (1935), reprinted in *A Legislative History of the National Labor Relations Act, 1935*, pp. 1319, 1346 (1985 Reprint, U.S. Government Printing Office).

¹⁹ Ironically, while the Board may not issue a complaint based upon conduct occurring more than six months before filing and service of the charge (29 U.S.C. § 160(b)), the six month limitations period does not begin to run until the party adversely affected receives actual or constructive notice of the unfair labor practice. See *Lehigh Metal Fabricators*, 267 NLRB 568, 114 LRRM 1064 (1983); *Plymouth Locomotive Works*, 261 NLRB 595, 110 LRRM 1155 (1982); *Crown Cork & Seal Co.*, 255 NLRB 14, 107 LRRM 1195 (1981).

labor practice strike. See *NLRB v. Burkart Foam*, 848 F.2d 825 (7th Cir. 1988); *NLRB v. Jarm Enters*, 785 F.2d 195 (7th Cir. 1986); *NLRB v. Charles D. Bonanno Linen Serv.*, 782 F.2d 7 (1st Cir. 1986); *Vulcan-Hart Corp. v. NLRB*, 718 F.2d 269 (8th Cir. 1983). The most significant aspect of an unfair labor practice strike is that strikers are entitled to reinstatement to their former positions upon an unconditional offer to return to work. *Pecheur Lozenge Co.*, 98 NLRB 496, 29 LRRM 1367 (1952), *enforced as modified*, 209 F.2d 393, 33 LRRM 2324 (2nd Cir. 1953). In effect, the economic strikers would be entitled to reinstatement if the NLRB were to find that Midwest committed an unfair labor practice which had the effect of prolonging the economic strike (i.e., that hiring permanent replacements presumptively prolonged Midwest's strike). See *Vulcan-Hart Corp.*, 718 F.2d 269; *Gilberton Coal Co.*, 291 NLRB 344, 131 LRRM 1329 (1988), *enforced*, 888 F.2d 1381 (3rd Cir. 1989). These strikers would have to be reinstated even though Midwest hired permanent replacements. See *Mackay*, 304 U.S. 333.

Moreover, Midwest would be required to terminate its current permanent replacements, even though they were legally hired. See *NLRB v. Elco Manufacturing Co.*, 227 F.2d 675 (1st Cir. 1955), *cert. denied*, 350 U.S. 1007 (1956); *NLRB v. Remington Rand, Inc.*, 130 F.2d 919 (2nd Cir. 1942). Midwest's picture could become even more oppressive because the terminated permanent replacement workers could sue Midwest for breach of contract and misrepresentation in North Dakota state court upon their discharge to make room for reinstatement of the economic strikers. See *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983).²⁰ The weight of such multiple

²⁰ The Supreme Court of North Dakota has upheld similar breach of contract suits. See *Lambott v. United Tribes Educational Technical Center*, 361 N.W.2d 590 (1985).

litigation alone could force Midwest out of business. Indeed, the real world consequences to Midwest of applying federal striker replacement legislation retroactively under *Bradley* based upon mere labels could be staggering.

Therefore, it is in determining a clear congressional intent that judicial review and the principle of fairness embodied in the rule of statutory construction against retroactivity become imperative. Petitioners segregate this critical analysis entirely from the determination of the "plain meaning" and "clear intent" of the statute by misinterpreting *Bradley* to require the retroactive application of any new federal civil legislation which is labeled "procedural" or "restorative". As Midwest has shown, this argument is untenable.

CONCLUSION

Because of the conflicting principle in *Bradley* that retroactivity is *not* unjust and is presumed, the door is open for Congress to pass federal civil legislation (such as the Civil Rights Act of 1991 and the proposed federal striker replacement legislation), without resolving its applicability to current disputes. While such a state of confusion may enable Congress to pass controversial legislation, it improperly allows Congress to shift the burden of deciding the issue of retroactivity onto private litigants and the courts at an exorbitant cost.

Therefore, this Court should guide the lower courts and restore judicial order and economy, should encourage Congress to provide clear intent, and should preserve the important, long-standing origins and purpose of the cardinal rule of statutory construction against retroactivity. The Court would accomplish all of these objectives by reaffirming *Bowen* and overruling *Bradley*. Absent explicit retroactive language or clear congressional intent, legislation must apply only prospectively. This is the bright-line, common-sense rule needed to restore fundamental fairness to the concept of retroactivity.

district which had 26.7 percent African-American voting age population.⁸ Senate District 40 is 34.5 percent African-American VAP and included much of Representative Jones' House District.⁹

Testimony at trial forecast that District 40 would elect an African-American Senator.¹⁰ Based on the evidence, the district court found as a fact that Senate District 40 "performs as a third African-American district without adversely affecting Hispanics in the Dade County area." J.S. App. 66a.

In the November 1992 elections, Senate District 40, which the district court termed "a strong African-American influence district," J.S. App. 64a, did, in fact, elect an African-American Senator, Daryl Jones.¹¹

SUMMARY OF ARGUMENT

In this consolidated appeal of three separate lawsuits, not a single party challenges the district court's findings of a Section 2 violation in the Senate districts in Dade County with respect to African-American plaintiffs. These issues are not before the Court and, in any event, the findings were not clearly erroneous.

⁸ *Id.*

⁹ *Id.*

¹⁰ Testimony of Leon Russell, first vice president of the Florida State Conference of NAACP Branches. Vol. III Tr. 136 (Daryl Jones, an African-American, will win Senate District 40); testimony of Representative Willie Logan, Chairman of the Florida Caucus of Black State Legislators, Vol. III Tr. 147.

¹¹ Although the November 1992 election results occurred post-trial and therefore are not in the trial record, this Court can take judicial notice of the certified copy of relevant pages from *Elections 1992; State of Florida Official General Election Returns: Nov. 3, 1992*, Fla. Dept. of State, Div. of Elections (hereinafter "1992 Official General Election Returns") which is attached as an Appendix to this brief. *Brown v. Piper*, 91 U.S. 37, 42 (1875) (judicial notice taken of the election of senators).

Failure to conduct a remedy hearing was error. The limited evidence of remedy at the liability trial was not sufficient to permit the court below to throw up its hands and declare that no remedy was possible. If, after a full remedial hearing, it appears that complete relief can be only accorded to one minority group, it should be that minority group which the court below finds to be the most historically disadvantaged in the affected political unit, here African-Americans in the Dade County area.

The proceedings in the Florida Supreme Court were expressly "without prejudice" to later assertion of Voting Rights Act claims that the state court's limited review neither resolved nor provided opportunity to resolve. Questions about "influence" districts, citizen voting age population (CVAP) and sustained electoral success necessary to prove a defense of proportional representation under *Thornburg v. Gingles*, 478 U.S. 30 (1986), are not necessary to the decision by the Court and, if reached, do not in any event affect the liability determination in favor of African-American plaintiffs arising out of the Senate districts in Dade County.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY FOUND LIABILITY UNDER SECTION 2 OF THE VOTING RIGHTS ACT IN FAVOR OF AFRICAN-AMERICAN PLAINTIFFS.

Although there was initial confusion in the district court about its liability holding, this confusion was dispelled by the court's opinion. J.S. App. 72a. As clarified, the district court found violations of Section 2 of the Voting Rights Act with respect to the Senate districts in Dade County, but on the record before it declined to order a remedy.

As to the determination of liability to African-American plaintiffs under Section 2 of the Voting Rights Act, the court below was clearly correct and amply supported by

the record.¹² None of the consolidated appeals before this Court challenges those findings of fact or that conclusion of law.

To the extent that several *amici*¹³ contend that proof of the three threshold *Gingles* factors does not conclusively establish a Section 2 violation, this argument misstates the district court's holding "that the plaintiffs have satisfied each of the three elements *Gingles* requires and that when considered together with the Senate factors, the 'totality of circumstances' show that with respect to Florida's Senate plan, Hispanic and African-American vote dilution exists in Dade County in violation of § 2 of the Voting Rights Act." J.S. App. 30a (emphasis supplied). Even more to the point, *amici* may not raise questions not presented by the parties. *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 60 n.1 (1981); *Bell v. Wolfish*, 441 U.S. 520, 532 n.13 (1979). Since none of the parties has challenged the findings of Section 2 violations with respect to vote dilution of African-Americans in Senate districts, the *amici* may not do so.¹⁴

There was initial confusion below about the proper interplay of liability and remedy in the context of multiple—and perhaps competing—Section 2 claims in a consolidated lawsuit. Ultimately, the district court got it right—a plaintiff does not carry the burden in its liability case to prove the efficacy of any particular remedy. Nothing in the language of the Voting Rights Act of 1965 as amended,¹⁵ the Senate report explaining the 1982 amend-

¹² See the United States' brief, at 6-7.

¹³ Brief *amicus curiae* of Anti-Defamation League of B'Nai B'rith at 10 *et seq.*; Brief *amici curiae* of the American Jewish Congress *et al.* at 41.

¹⁴ Although the brief of the American Jewish Congress does not list a "Question Presented," it is apparent from topic heading III B and its entire argument that it is directly attacking this Court's plurality opinion in *Thornburg v. Gingles*, *supra*.

¹⁵ 42 U.S.C. §§ 1973 *et seq.*

ments,¹⁶ or this Court's decision in *Thornburg v. Gingles*, *supra*, imposes that additional burden on plaintiffs—or even contemplates it.

Such a result would be bad law and worse policy. If plaintiffs were required to prove remedy as an additional element of the liability case, it would contravene in large part this Court's prior holdings that the State must be given the first opportunity to submit a plan that remedies a Section 2 violation.¹⁷ Sound considerations of the proper boundaries between legislative and judicial branches vest in the legislature the duty to choose among competing political values in drawing boundaries not otherwise required to redress legal violations. Moreover, as a practical matter, it is usually the State in the first instance that has access to superior data and computer technology to draw political boundaries to redress legal violations.

Accordingly, the liability determination should be affirmed.

II. REMEDIAL PROCEEDINGS WERE NECESSARY.

The district court did not hold a remedial hearing on the Senate districts.¹⁸ Instead, it relied upon some of the evidence that had been introduced at the liability stage in order to support its conclusion in regard to remedy. The error here is manifest. If courts could dispense at will with remedial proceedings, particularly without advance notice to the parties, the liability phases of these already-complicated redistricting proceedings would be turned into a jumble of confusing evidence, as parties tried to make certain that they anticipated and dealt with every possible remedy in the event the court decided to forego the second stage.

¹⁶ S.Rep. No. 417, 97th Cong., 2d Sess. (1982).

¹⁷ *Connor v. Finch*, 431 U.S. 407, 414-15 (1977); *Chapman v. Meier*, 420 U.S. 1, 27 (1975); *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (opinion of White, J.).

¹⁸ It held a short, same-day non-evidentiary proceeding on the House remedy.

There are valid reasons for a two-stage approach to redistricting. First, neither the courts nor the parties should have to spend valuable resources dealing with remedies unless it is clear—and the courts have already held—that there is liability. This necessarily means a two-stage process.

Second, although new evidence will undoubtedly be introduced, the parties at the remedial proceeding should also be able to build upon, explain or rebut the evidence relating to remedy tangentially introduced at the liability stage. This is not possible if the liability stage is on-going at the time the remedial evidence is submitted.

Third, holding a separate remedial hearing will give the parties time to develop and present various workable plans that the courts can then consider in light of the entire record. The problems inherent in the alternative approach are apparent from the instant record: during the liability stage, after a very short time to think about the matter, the NAACP representative was not able to construct a plan that he thought would accommodate both the Hispanic and African-American interests. This dilemma may have been subsequently solved, however, after more reflection and computer work-time could be devoted to the task. All of this confusion could easily have been avoided if the district court had made clear from the outset that remedies would not be addressed until after liability had been either proved or disproved.

The district court's remedial conclusion, although defensible if in the expedited context of a motion for preliminary injunction, is particularly suspect here where the court below denied a same-day motion for reconsideration that presented it with the very 4-3 plan that the court had found was not possible. JA 482. In truth, the 4-3 plan in all likelihood would have been proved possible and in any event should have been the subject of remedial proceedings.

In closing argument, counsel for the NAACP suggested the appropriate remedial course for the district court to follow:

Now, for the sake of argument, assuming that this Court actually is faced with two viable claims in South Florida, how is this Court to resolve that problem? Of course, in an ideal world, the Court could simply order the drawing of four majority Hispanic districts and three majority black districts for the Senate. *If it is possible to accomplish that solution*, the NAACP supports that solution. NAACP does not seek to come into this Court and advance a claim on behalf of its members at the expense of another minority group.

* * * *

On the other hand, what happens if this Court ultimately concludes that a 4/3 solution for the Senate in South Florida is not possible? What if there really are two viable and competing and mutually exclusive claims? And I submit to Your Honor that the solution at that point is to in effect give the edge to the minority group that has demonstrated historically the greatest difficulty in achieving political empowerment in South Florida. And I submit to Your Honor that the record is clear that that is African-Americans.

From the Congressional trial this Court has before it Census data that is replete with evidence that in South Florida, in areas of jobs and housing and education and health care, blacks are very, very seriously disadvantaged and comparably more disadvantaged than are Hispanic groups. The record also is replete with evidence that the Hispanic population in South Florida is growing much more rapidly than the black population of South Florida, thereby making it ever more difficult for blacks to elect their candidates of choice. [JA 475-76 (emphasis supplied).]

This is still the NAACP position: if a plan can be devised, as here, where both minority groups can be accommodated, that should be done; but in a situation where the two plans really are mutually exclusive, the advantage should be given to the historically most disadvantaged of the two groups, which in this case was the

African-American group. This approach provides a bright-line test that the NAACP respectfully commends to this Court as preferable to the district court's conclusion of violations for which there is no remedy.

The NAACP is *not* seeking in this Court an outcome as appellee that "would result in greater relief than was awarded . . . by the District Court." *Barry v. Varchi*, 443 U.S. 55, 69 n.1 (1979). As explained by the court below, J.S. App. 65a, the State plan created, in effect, a third African-American district in Senate District 40 that subsequently elected African-American Daryl Jones in November 1992.

In any event, while this Court certainly can provide guidance to the district court on the subject of mutually-exclusive remedies, we submit that the entire subject of remedies should be decided in the first instance by the district court at a remedial hearing after all parties are given an opportunity to appear and be heard.

III. THIS COURT NEED NOT REACH ANY HYPOTHETICAL QUESTION ABOUT "INFLUENCE" DISTRICTS.

As noted above, in November 1992 the voters of Florida Senate District 40 elected Daryl Jones, an African-American, to the State Senate.¹⁹ Florida Senate District 40 is thus more than an "influence" district. The court below correctly found as a fact that African-Americans could elect a candidate of their choice in that district. It is a district today represented by an African-American Senator.

In light of this electoral development, the NAACP respectfully suggests that this case is not an appropriate vehicle for abstract speculation about "influence" districts. The entire discussion by the United States at pages 16-18

¹⁹ Appendix at 3a.

of its brief, therefore, need not be addressed.²⁰ Here, as in *Voinovich*,²¹ *Grove*²² and *Gingles*,²³ hypothetical questions about influence districts can be preserved for another day and a proper case where they are directly presented.

IV. THE DISTRICT COURT PROPERLY DEFERRED JURISDICTION UNDER *GROVE* v. *EMISON* UNTIL STATE PROCEEDINGS WERE CONCLUDED.

Anticipating this Court's decision in *Grove v. Emison*, *supra*, the district court stayed this action until the conclusion of all state proceedings. The district court was clearly correct.

Any suggestion that the NAACP and others might be barred by *res judicata* or collateral estoppel by virtue of the Florida Supreme Court's proceedings misconstrues the limited review by that court. There was no full and fair opportunity to litigate the NAACP's Voting Rights Act claims in the two proceedings there. *Allen v. McCurry*, 449 U.S. 90 (1980). Indeed, as outlined below, the Florida Supreme Court said so expressly.

The proceedings in the Florida Supreme Court were original actions, by the state attorney general, pursuant to article III, section 16(c) of the Florida Constitution. That section mandates a judgment by the Florida Supreme Court within thirty days regarding the validity of

²⁰ The NAACP also agrees with the United States' earlier brief in opposition to motion to dismiss or affirm, No. 92-767 at pp. 9-10, that "[t]he difficult questions concerning the definition and legal status of influence districts in Section 2 litigation were not fully developed in this litigation . . ." and with its suggestion that "[t]he need to address those questions can be obviated by remanding the case to the district court for appropriate remedial proceedings." *Id.* at 10.

²¹ *Voinovich v. Quilter*, 113 S.Ct. 1149, 1157-58 (1993).

²² *Grove v. Emison*, 113 S.Ct. 1075, 1084 n.5 (1993).

²³ *Gingles*, 478 U.S. at 46-47 n.12.

a reapportionment plan. In its May 13, 1992 decision, the Florida Supreme Court acknowledged:

At the same time, it is impossible for us to conduct the complete factual analysis contemplated by the Voting Rights Act, as interpreted in *Thornburg v. Gingles*, within the time constraints of article III, section 16(c). . . . Any decision which requires consideration of facts that are unavailable in our analysis will have to be resolved in subsequent litigation, as explained later in this opinion. [*In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992*, 597 So. 2d 276, 282 (Fla. 1992).]

The court's holding was specifically "without prejudice to the right of any protestor to question the validity of the plan by filing a petition in this Court alleging how the plan violates the Voting Rights Act." *Id.* at 285-86. This "without prejudice" language means that there was no adjudication on the merits of the Voting Rights Act issues and thus no *res judicata* effect, as this Court has recognized. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396 (1990). The NAACP chose to litigate in federal court, which had concurrent jurisdiction. J.S. App. 16a.

Subsequently, when the United States Department of Justice did not preclear Florida's reapportionment under Section 5 of the Voting Rights Act and the Florida legislature reached impasse, the Florida Supreme Court, pursuant to the Florida Constitution, adopted a revised Florida reapportionment plan that resolved the Section 5 objections. The limited nature of the second Florida Supreme Court proceeding was emphasized by its Chief Justice, who stressed that "this Court's review in the present proceeding is limited in scope to DOJ's section 5 preclearance inquiry. . . ." *In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992*, 601 So. 2d 543, 548 (1992) (Shaw, C.J., specially concurring).

Neither *res judicata* nor collateral estoppel is therefore applicable here.

V. PROPORTIONAL REPRESENTATION IS NOT AN ABSOLUTE DEFENSE.

Proportional representation is neither an absolute floor nor an absolute ceiling under Section 2 of the Voting Rights Act. The Act itself expressly disclaims that proportional representation is any type of floor for equal political opportunity for minorities. 42 U.S.C. § 1973(b). Neither is proportional representation, without evidence of sustained electoral success, a ceiling on equal political opportunity. This Court so held in *Thornburg v. Gingles*, 478 U.S. at 77 (opinion of Brennan, J.); *id.* at 102 (O'Connor, J., concurring in judgment) ("I agree with Justice Brennan that *consistent and sustained success* by candidates preferred by minority voters is presumptively inconsistent with the existence of a § 2 violation") (emphasis supplied).

The statutory test under Section 2(b) requires examination of the "totality of the circumstances." As this Court stated in *Gingles*:

Section 2(b) provides that "[t]he extent to which members of a protected class have been elected to office . . . is one circumstance which may be considered." 42 U.S.C. § 1973(b). The Senate Committee Report also identifies the extent to which minority candidates have succeeded as a pertinent factor. S. Rep. at 29. However, the Senate Report expressly states that "the election of a few minority candidates does not 'necessarily foreclose the possibility of dilution of the black vote,' " noting that if it did, "the possibility exists that the majority citizens might evade [§ 2] by manipulating the election of a 'safe' minority candidate." *Id.*, at 29, n. 115 [citations omitted]. The Senate Committee decided, instead, to "require an independent consideration of the record." S.Rep. 29, n. 115. The Senate Report also

emphasizes that the question whether "the political processes are 'equally open' depends upon a searching practical evaluation of the 'past and present reality.'" *Id.*, at 30 (footnote omitted). Thus, the language of § 2 and its legislative history plainly demonstrate that proof that some minority candidates have been elected does not foreclose a § 2 claim. [478 U.S. at 75.]

Applying the "totality of circumstances" test, this Court in *Gingles* held that *sustained* electoral success in *the last six elections* that resulted in proportional representation of African-American residents in House District 23 was a successful defense negating any allegation of unequal opportunity to elect representatives of choice by African-Americans. *Id.* at 77. This Court rejected the contention of appellants "that if a racial minority gains proportional or nearly proportional representation *in a single election*, that fact alone precludes, as a matter of law, finding a § 2 violation." *Id.* at 75 (emphasis supplied).

Similarly here, in the absence of a showing of sustained electoral success, proportional representation is but one factor in the totality of circumstances to be taken into account. The court below considered the evidence, gave it proper weight and committed no error.²⁴

Since proportional representation is not an absolute defense but only one of several factors in the "totality of circumstances", issues as to its measurement (*i.e.*, total population, VAP or CVAP) take on less importance in this case and may well vary from case to case depending on local circumstances. The measurement issue was left open by this Court in *Grove v. Emison*, 113 S.Ct. at 1083 n.4.

²⁴ The court considered evidence both statewide and with respect to the Dade County area. Both are part of the "totality of circumstances"; House appellants unduly emphasize County statistics alone. With respect to African-Americans, the court below made extensive statewide findings about past discrimination in Florida against African-Americans. *See, e.g.*, J.S. App. 53a-54a.

In this case, the district court made detailed findings of fact about the use of VAP,²⁵ the need for a Hispanic supermajority VAP to take into account lower citizen and registration rates,²⁶ and the use of a lower majority VAP for African-Americans reflecting recent increases in African-American turnout and voter registration.²⁷ The court, noting the unavailability of CVAP data, heard testimony of estimates of noncitizenship among Hispanics, found certain estimates to be unreliable,²⁸ and relied instead on an analysis of past election results by Dr. Lichtman to estimate noncitizen rates.²⁹

In short, the district court did precisely what this Court, in *Gingles*, indicated had to be done. It made careful factual findings about the impact of non-citizenship. There is no need for this Court to reach, much less reverse, those findings.

²⁵ J.S. App. 31a *et seq.*

²⁶ J.S. App. 32a *et seq.*

²⁷ J.A. App. 39a-40a.

²⁸ J.S. App. 74a (Vinson, J., concurring).

²⁹ J.S. App. 75a (Vinson, J., concurring).

CONCLUSION

The NAACP respectfully submits, for the reasons set forth above, that the liability findings of the district court should be affirmed, the permanent remedial plan should be vacated and remanded for a full evidentiary hearing, and this Court should not reach or decide hypothetical issues about influence districts and CVAP.

Respectfully submitted,

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JUN 03 1993

IN THE
Supreme Court of the United States OF THE CLERK

OCTOBER TERM, 1992

BARBARA LANDGRAF,
v. *Petitioner,*

USI FILM PRODUCTS, BONAR PACKAGING, INC.
and QUANTUM CHEMICAL CORPORATION,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

MAURICE RIVERS and ROBERT C. DAVISON,
v. *Petitioners,*

ROADWAY EXPRESS, INC.,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

BRIEF FOR MIDWEST MOTOR EXPRESS, INC.
AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-757

BARBARA LANDGRAF,
v. *Petitioner.*

USI FILM PRODUCTS, BONAR PACKAGING, INC.
and QUANTUM CHEMICAL CORPORATION,
Respondents.

**On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit**

No. 92-938

MAURICE RIVERS and ROBERT C. DAVISON,
v. *Petitioners,*

ROADWAY EXPRESS, INC.,
Respondent.

**On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit**

**BRIEF FOR MIDWEST MOTOR EXPRESS, INC.
AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS**

INTEREST OF THE *AMICUS CURIAE*

Midwest Motor Express, Inc. ("Midwest") is an interstate motor carrier of freight located in Bismarck, ND, operating in nine states. Midwest's interest stems from likely legislation pending in Congress that would create another retroactive application problem identical to the one under the Civil Rights Act of 1991 now before this Court. Enactment of such legislation without a clear-cut *prospective* effective date would expose Midwest to serious threat of injury. Therefore, *amicus* seeks resolution by this Court of the apparently conflicting precedents on retroactive application of federal civil legislation.

Since August 12, 1991, Midwest has been engaged in a labor dispute with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Teamsters"), within the meaning of the Norris-LaGuardia Act (29 U.S.C. § 111(c)), and the National Labor Relations Act ("NLRA") (29 U.S.C. § 152(9)), as applied to the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA") (29 U.S.C. § 1398).¹ Nevertheless, not unlike the instant appeals under the Civil Rights Act of 1991, a proposed amendment to the NLRA threatens to turn Midwest's past legal actions into illegal ones—by retroactive application of a new law.

Legislation has been introduced in Congress to amend the NLRA (H.R. 5 and S. 55) which contains no effective date concerning when an employer may be prohibited from hiring permanent replacement workers during eco-

¹ The Teamsters struck Midwest on August 12, 1991, after negotiations over a new contract reached an impasse. Following commencement of the strike, the parties resumed bargaining with the assistance of a federal mediator, which bargaining has continued to the date of this brief without settlement. During the course of this labor dispute, Midwest has continued to operate only by hiring permanent replacements as it is permitted to do under current federal law.

nomie (wage and benefit) strikes. The relevant identical language of H.R. 5 and S. 55 is excerpted and attached as Appendix A. Consequently, if that legislation passes as currently drafted,² and if this Court now fails to resolve the apparent conflict between *Bradley v. School Board of the City of Richmond*, 416 U.S. 696 (1974) and *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), Midwest expects that controversy and confusion similar to that engendered by the retroactive application of the Civil Rights Act of 1991 will occur. Such confusion is likely to result in serious adverse harm to Midwest's business and could subject it to unfair labor practice charges and/or costly state litigation. *See infra* at 13-17. The mere prospect of these occurrences is jeopardizing Midwest's ability to remain in business.

Accordingly, *amicus* has a vital interest in the resolution of the issues raised in this case. *Amicus* believes it will bring insights and information beyond what is presented by Petitioners and Respondents, which will be useful to the Court in deciding the issues presented.³

STATEMENT

These cases involve contradictory principles governing the prospective application of civil laws, which conflict this Court so far has been reluctant to resolve. Although the principle of prospectivity dates to the Greeks and Romans,⁴ it has not always been followed by this Court.

² H.R. 5 and S. 55 were introduced in the Senate and the House of Representatives in January 1993. H.R. 5, 103rd Cong., 1st Sess., § 1, 139 Cong. Rec. H82, (daily ed. Jan. 5, 1993); S. 55, 103rd Cong., 1st Sess., § 1, 139 Cong. Rec. S191, (daily ed. Jan. 21, 1993). House and Senate floor action is eminent, and the Clinton Administration has endorsed the legislation as drafted. *Fairness in the Workplace: Restoring the Right to Strike: Hearing on S. 55 Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources*, 103rd Cong., 1st Sess. (March 30, 1993) (statement of Robert B. Reich, Secretary of Labor).

³ This brief is filed with the written consent of the parties. The letters of consent have been filed with the Clerk of Court.

⁴ As begins the seminal work on the rule against retroactivity: "The bias against retroactive laws is an ancient one." Smead,

At the heart of the dispute is this Court's holding that a court is to apply the law in effect at the time it makes its decision, unless doing so would result in "manifest injustice" or there is statutory direction (or legislative history) to the contrary. *Bradley*, 416 U.S. at 711. On the other hand, this Court more recently reaffirmed that "[R]etroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have effect unless their language requires this result." *Bowen*, 488 U.S. at 208.

There is a compelling reason for this Court to clarify its position and to adopt a bright-line, common-sense ruling based on *Bowen*. As Justice Scalia urged in *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 110 S. Ct. 1570, 1579 (1990) (Scalia, J., concurring), this Court should overrule *Bradley* and reaffirm the clear intent rule, since retroactive application is "never sought (or defended against) except as a means of 'affecting substantial rights and liabilities,'" and even procedural changes applied retroactively alter such rights. *Id.* at 1585. Thus, this Court should heed Justice Scalia's warning that "manifest injustice" is "just a surrogate for policy preferences" and that justice can mean "whatever other policy motivation might make one favor a particular result." *Id.* at 1587.

Failure to resolve this conflict will lead to continued examples of congressional recklessness, as demonstrated by the instant cases under the Civil Rights Act of 1991.⁵ Midwest contends that the same result will occur in

The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence, 20 Minn. L. Rev. 775, 776-85 (1936).

⁵ Only controversy, confusion, and expensive and protracted litigation has resulted when Congress deliberately leaves the effective date issue unresolved, as it did in the Civil Rights Act of 1991. As of mid-1992, 49 federal courts had ruled against retroactivity and 35 had ruled in favor of it. See Marcus, *A Percolating Legal Dispute on Civil Rights*, *The Washington Post*, April 17, 1992, at A21.

federal striker replacement and other legislation, unless the cardinal rule upheld in *Bowen* is reaffirmed.

SUMMARY OF ARGUMENT

Respondents ask this Court to affirm the decisions by the Fifth and Sixth Circuits that the Civil Rights Act of 1991 does not apply retroactively. In support, Midwest submits that the judicial chaos surrounding the retroactive application of legislation is the result of a dramatic departure from the historical rule against retroactivity.

Whether *Bradley* and *Bowen* can co-exist on a highly theoretical basis is, at best, debatable. See *infra* note 10 and accompanying text. In practice, however, clarifying the existing confusion necessarily depends on rejecting the irreconcilable precept which *Bradley* has been held to support that it is *not* unjust, in most cases, to apply new civil legislation retroactively.

The Supreme Court must find *Bradley* is applied wrongly as a "presumption" in favor of retroactivity whenever a new liability altering the position of private litigants and parties is involved, whether substantive or procedural rights are implicated. See Kahn, *Completed Acts, Pending Cases, and Conflicting Presumptions: The Retroactive Application of Legislation After Bradley*, 13 George Mason Univ. L. Rev. 231, 239-40 (Winter 1990). To this extent, the Supreme Court should overrule *Bradley* and reaffirm the long-standing rule of statutory construction that federal civil legislation only applies prospectively, unless there is a clear legislative intent to the contrary. Ambiguity—either intentional or unintentional—must be resolved in favor of the prospective application of legislation.

Moreover, Petitioners' interpretation of *Bradley* represents a blatant departure from the fundamental principles of fairness inherent in the clear intent rule upheld in *Bowen*. Accordingly, Petitioners' analysis stands wholly outside of the implicit constitutional and relevant policy factors which this Court must weigh in deciding these

cases. Under Petitioners' view, judicial review, Congress' role, and fairness each is undermined.

First, Petitioners erroneously assume that Respondents have acted wrongly in order to argue that Respondents have no "vested right to do wrong." *Rivers v. Roadway*, Pet. Brf. at 29; *Landgraf v. USI Film Products*, Pet. Brf. at 31. Second, Petitioners unpersuasively argue that the plain meaning of the Civil Rights Act of 1991 demonstrates a clear congressional intent to apply the law retroactively. Third, Petitioners move beyond the pale and assert that, under *Bradley*, any law (whether procedural or substantive) must be presumed retroactive based upon whatever label, political spin or policy preference the prevailing members of Congress place on the law, regardless of its effect on private parties or "what the original statute actually meant." *Rivers v. Roadway*, Pet. Brf. at 38. In Petitioners' view, if Congress labels a statute remedial or restorative, there is no room for judicial scrutiny.⁶ *Landgraf v. USI Film Products*, Pet. Brf. at 29-33; *Rivers v. Roadway*, Pet. Brf. at 35-39. This Court must reject each of these specious arguments.

Rather than merely a judicial preemption useful in interpreting ambiguous legislation, *Bowen* moreover, represents the cardinal rule of statutory construction in determining the retroactive application of legislation. By clarifying *Bowen* as such, this Court will preserve the appropriate burdens and roles of the legislature and the judiciary, including the historical and proper role of judicial review as a check on the power of the legislature unfairly to render laws retroactive.

⁶ Ironically, the one type of law historically not forbidden by the American principle of prospectivity was the "curative" law validating past acts that otherwise would have been void. But even curative laws that impaired vested rights or otherwise worked an injustice to parties were condemned by the American principle. See Smead at 786, n.36.

ARGUMENT

I. THE PRINCIPLE UPHELD IN *BOWEN* REPRESENTS THE CARDINAL RULE OF STATUTORY CONSTRUCTION GOVERNING THE RETROACTIVE APPLICATION OF FEDERAL CIVIL LEGISLATION

As Justice Scalia's concurring opinion in *Bonjorno* reveals, the principle that laws and customs should apply only to future transactions unless expressly stated that they apply either to past conduct or to pending transactions dates to the Greeks and Roman law. *Bonjorno*, 110 S. Ct. at 1586; *Fray v. Omaha World Herald Co.*, 960 F.2d 1370, 1374 (8th Cir. 1992). The principle, originally one of "natural law" which became a legal maxim under English law, was applied as a rule of statutory construction, and so found its way into American law.⁷ In the United States, however, largely as a result of judicial review, this rule of statutory construction was combined with the concept of "vested rights" and "justice" to become a part of the concept of justice and a limitation on legislative power.⁸ See Smead at 776-85.

Thus, the American principle of prospectivity has operated to protect vested rights by invalidating or narrowing the application of statutes that might have applied retrospectively. These included statutes that expressly

⁷ As in England, retroactive American laws were held to be oppressive and unjust, and it was maintained that the essence of law was that it be a rule for the future. Smead at 780, n. 21.

⁸ In addition to being a rule of statutory construction in American law, the American courts added a judicial limitation on the constitutional ability of a legislative body to alter pre-enactment rights and conduct. Judicial scrutiny is an important component of the American constitutional system which controls legislative behavior. See, e.g., *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 14-20 (1976). See also DeMars, *Retrospectivity and Retroactivity of Civil Legislation Reconsidered*, 10 Ohio Northern L. Rev. 253 (1983).

were enacted to take effect from a time prior to their passage, as well as statutes that were to operate from the time of their passage, but affected vested rights and past transactions.⁹ See Smead at 781-787, n.35. The fundamental notion has been and should be that, in most cases, it is unjust to apply new civil legislation retrospectively.

The rule against retroactivity thus embodies American constitutional notions of fairness and due process. Today, these factors must be considered by Congress and the courts in determining the validity of civil legislation which Congress *explicitly* makes retroactive. See, e.g., *Pension Benefit Guaranty Corp. v. R. A. Gray & Co.*, 467 U.S. 717 (1984) (rejecting a Fifth Amendment due process challenge to a federal statute that retroactively imposed liability on employers who withdrew from multiemployer pension plans); *Turner Elkhorn*, 428 U.S. 1.¹⁰ There-

⁹ The prohibition included retrospective laws as defined by Mr. Justice Story in *Society for the Propagation of the Gospel in Foreign Parts v. Wheeler*, (1814) 2 Gall. C.C. 105:

... Upon principle, every statute, which takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past, must be deemed retrospective. . . .

¹⁰ The Supreme Court has found the rational basis standard to be equivalent to the standard applied in *Welch v. Henry*, 305 U.S. 134, 147 (1938), where the Court held that a retroactive tax was constitutional unless its application was so "harsh and oppressive" as to violate due process. *R.A. Gray*, 467 U.S. at 733. This standard requires that there be a rational connection between the legislation's purpose and its retroactive effect. It is consistent with the rule against the retroactive application of legislation where Congressional intent is not explicit or clear. In the latter case, a statute need not be invalidated, but simply applied prospectively.

Arguably, the *Bradley* presumption in favor of retroactivity absent "manifest injustice" arose from cases in which retroactivity was explicit or clearly intended but "injustice" resulted. See *Bonjorno*, 110 S. Ct. at 1584. Theoretically, in this very limited context, *Bradley* remains viable. See also *Fray*, 960 F.2d at 1374 (*Bradley* did not "silently sweep away the traditional principle").

fore, when Congress makes a statute expressly retroactive, presumably it has reviewed these considerations and has resolved the inherent tensions involving fundamental fairness.

Accordingly, it is incongruous to suggest that legislation *not* explicitly made retroactive should be presumed to be retroactive, and then reviewed perfunctorily based upon a standard (such as Petitioners' conclusory remedial scheme), that ignores the fundamental issue of fairness which is the cornerstone of the historical rule of statutory construction against retroactivity. See DeMars at 264-272 (because the vested rights—remedial scheme approach utilizes analytically conclusive terms, it does not lead a court to consider the question of fairness which is also basic to the issue of statutory retrospectivity).

In particular, as with the Civil Rights Act of 1991, where Congress considered and rejected explicit retroactive application *and* failed to reach a consensus on its intent, after reviewing the requisite constitutional considerations, no finding of retroactivity is justified or should be compelled. See *infra* at 10-12.

Therefore, Midwest submits that the rule reiterated in *Bowen* is not only that prospectively must be upheld in the absence of clear intent, but further, that prospectivity must govern in determining clear intent when retroactivity is not explicit. Thus, to the extent that *Bradley* establishes a presumption in favor of retroactivity in the absence of clear intent or in determining clear intent, *Bradley* is wrong and should be overruled.

Accordingly, Midwest urges this Court to find that the cardinal rule of statutory construction in determining the retroactive application of federal civil legislation is the principle (and not merely the "presumption") that legislation must be applied prospectively, unless Congress specifically provides to the contrary. See Smead at 781 n.22; *U.S. v. Magnolia Petroleum Co.*, 276 U.S. 160, 162 (1928) ("statutes are not to be given retroactive

effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose to do so plainly appears"). *But see Luddington v. Indiana Bell Telephone*, 966 F.2d 225, 228 (7th Cir. 1992), *petition for cert. pending*, No. 92-977 (*dictum*) (prospectivity "is resolved, but not all the way" because we are "speaking only of a presumption" against retroactivity). Only in concert with this paramount rule, can ancillary rules of construction utilized by the courts to determine statutory meaning and legislative intent (i.e., plain meaning) effectively operate without injury to the historical notions of fairness and justice upon which the principle is based.

II. BOWEN PRECLUDES THE RETROACTIVE APPLICATION OF NEW FEDERAL CIVIL LEGISLATION, SUCH AS THE CIVIL RIGHTS ACT OF 1991, WHERE NO CONGRESSIONAL INTENT IS CLEAR

The express retroactive provisions of the Civil Rights Act of 1990 stirred much debate and disagreement as Congress grappled with concerns of fairness and constitutionality.¹¹ President Bush vetoed the 1990 act,¹² and Congress failed to override the veto. 136 Cong. Rec. S16,589 (daily ed. Oct. 22, 1990). In 1991, the bill's sponsors dropped the express retroactive provisions in order to gain acceptance and, instead, inserted language providing that "the amendments made by this Act shall

¹¹ See, e.g., H.R. 4000, The Civil Rights Act of 1990; *Joint Hearing: Before the Comm. on Education and Labor and the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 101st Cong., 2d Sess. (1990); Civil Rights Act of 1990; *Hearing Before the Senate Comm. on Labor and Human Resources on S. 2104*, 101st Cong., 1st Sess. (1989).

¹² President's Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 26 Weekly Comp. Pres. Doc. 1632-34 (Oct. 22, 1990), *reprinted in* 136 Cong. Rec. S16,457, S16,458 (daily ed. Oct. 24, 1990).

take effect upon enactment."¹³ § 402 (a), 105 Stat. 1099. Arguably, this language explicitly states that the Act applies prospectively. Alternatively, the inference of Congress' action is that prospectivity is intended. See e.g., *National Woodwork Manufacturers Ass'n v. NLRB*, 386 U.S. 612, 640 (1967).

Because of its contradictory legislative history, however, the 1991 provision leaves open whether the law applies retroactively to cases pending on the date of enactment or whether the law applies only prospectively to future cases.¹⁴ Clearly, the Act was passed without agreement on the issue, and apparently various members of Congress hoped this Court would resolve the known conflicting legal authorities in *Bradley* and *Bowen* in their favor. Congress thereby intentionally left its meaning unresolved. Thus, Petitioners' argument that the plain meaning of the Civil Rights Act of 1991 compels retroactivity fails. See *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363, 1372-1373 (5th Cir. 1992).

In *Bonjorno*, the Supreme Court simply reaffirmed that "where the congressional intent is clear, it governs." *Bonjorno*, 110 S. Ct. at 1577. But enactment of an ambiguous statute such as the Civil Rights Act of 1991,

¹³ On November 21, 1991, President Bush signed the Civil Rights Act of 1991. Pub. L. No. 102-166, 105 Stat. 1071 (1991). In addition to reversing several Supreme Court decisions, the Act made substantial substantive and procedural changes including changes in adjudicator (jury) and damages (compensatory and punitive damages).

¹⁴ See 137 Cong. Rec. S15,483, S15,485 (daily ed. Oct. 30, 1991) (interpretive memorandum submitted by Sen. Danforth, the bill's Republican sponsor, arguing against retroactivity); 137 Cong. Rec. S15,472, S15,478 (daily ed. Oct. 30, 1991) (interpretive memorandum submitted by Sen. Dole arguing against retroactivity); 137 Cong. Rec. S15,485 (daily ed. October 30, 1991) (interpretive memorandum by Sen. Kennedy, the bill's Democratic sponsor, arguing for retroactivity by characterizing the law as a "restoration of a prior rule"). Notably, no sponsor characterized the legislation as merely procedural or remedial.

or a *silent* statute such as the proposed federal striker replacement legislation, can defy any meaningful attempt to discern congressional intent. Under these circumstances, the historical constitutional underpinnings of American law require that *Bowen* prevail as the cardinal rule of statutory construction, not merely as "presumption" to be utilized in deciding among competing policy considerations. In effect, reaffirming the *Bowen* clear intent rule would ensure that, in the future, Congress will deliberate and provide clear intent on the retroactive application of any legislation that contains potential constitutional and fairness concerns.¹⁵ Therefore, because nothing in the Civil Rights Act of 1991, or its legislative history, expresses a clear congressional mandate requiring retroactive application, the statute must not apply to pending cases.¹⁶

¹⁵ While the clear intent rule does not require that Congress make explicit its intent to apply a statute retroactively, it does require that Congress make its intent clear. *Bonjorno*, 110 S. Ct. at 1577. Hence, the cardinal rule against retroactivity may be superseded only by express statutory language or by implication when the statute "requires" it, i.e., when limiting the statute to prospective application would render it completely ineffective by defeating its entire purpose. See e.g., *United States v. Northeastern Pharmaceutical & Chem. Co., Inc.*, 810 F.2d 726, 733 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987) (in order to be effective, CERCLA had to reach past conduct).

¹⁶ Not surprisingly, the large majority of circuit courts have applied the *Bowen* "presumption" against retroactivity finding no clear expression of legislative intent to the contrary. See *Lehman v. Burnley*, 866 F.2d 33, 37 (2nd Cir. 1989); *Davis v. Omitowoju*, 833 F.2d 1155, 1170-1171 (3rd Cir. 1989); *Leland v. Federal Ins. Adm'n.*, 934 F.2d 524, 528-529 (4th Cir.), *cert. denied*, 112 S. Ct. 417 (1991); *Storey v. Shearson-American Exp.*, 928 F.2d 159, 161-162 (5th Cir. 1991); *Vogel v. City of Cincinnati*, 959 F.2d 594, 597-598 (6th Cir. 1992); *Mozee v. American Commercial Marine Serv. Co.*, 963 F.2d 929, 936 (7th Cir.), *cert. denied*, 113 S. Ct. 207 (1992); *Simmons v. A.L. Lockhart*, 931 F.2d 1226, 1230 (8th Cir. 1991); *DeVargas v. Mason and Hanger-Silas Mason Co., Inc.*, 911 F.2d 1377, 1392 (10th Cir. 1989), *cert. denied*, 111 S. Ct. 799 (1991); *Gersman v. Group Health Ass'n*, 975 F.2d 886, 900 (D.C. Cir. 1992); *Wagner Seed Co. v. Bush*, 946 F.2d 918, 924 (D.C.

III. THE RETROACTIVE APPLICATION OF LEGISLATION, SUCH AS THE CIVIL RIGHTS ACT OF 1991, WHICH CREATES NEW LIABILITIES AND DUTIES BEYOND RESTORATIVE LAW, RESULTS IN STAGGERING REAL WORLD CONSEQUENCES

The Civil Rights Act of 1991 significantly expands both 42 U.S.C. Section 1981 and Title VII of the Civil Rights Act of 1964 to include new causes of action as well as new classes of plaintiffs. The enhanced remedies for intentional discrimination under Title VII in effect create new liabilities for sexual harassment in situations that do not involve tangible job detriments, such as "hostile environment" cases in which the plaintiff suffered no specific adverse employment action that resulted in economic harm. Monetary damages were never available before in such cases under Section 1981 or Title VII. Rights under Section 1981 are extended to post-formation contractual relationships. In effect, conduct insufficient to impose *liability* on employers before the Act was passed, may now be enough to result in a finding of discrimination against those same employers. Coil and Weinstein, *Past Sins or Future Transgressions: The Debate Over Retroactive Application of the 1991 Civil Rights Act*, 18 Employee Relations Law Journal 5, 6 (1992); see e.g., *Baynes v. AT&T Technologies, Inc.*, 976 F.2d 1370, 1374-1375 (1992); *Luddington*, 966 F.2d at 229.

Nevertheless, Petitioners argue that the Civil Rights Act of 1991 affects only procedure or remedies, and thus should be applied retroactively.¹⁷ In addition to precluding a meaningful analysis of fairness, a key problem with this approach is that the label applied to a particular

Cir. 1991), *cert. denied*, 112 S. Ct. 1584 (1992); *Alpo Pet Foods, Inc. v. Ralston Purina Co.*, 913 F.2d 918, 922-923 (Fed. Cir. 1990).

¹⁷ If Congress had, in fact, intended *only* to restore prior law or to provide remedial rights that did *not* create new liabilities, Midwest submits it could have written language to achieve that limited result. See *Johnson*, 965 F.2d 1363.

change may not reflect whether the change alters substantive rights or conduct. The label becomes a "policy" tool for proponents of retroactive legislation. See *Bonjorno*, 110 S. Ct. at 1585.

Petitioners also argue that, because one purpose of the Civil Rights Act of 1991 was Congress' intent to overturn recent Supreme Court decisions on discreet employment law issues, retroactivity must be presumed. See *Rivers v. Roadway*, Pet. Brf. at 35-39. While a few courts, grappling with the conflict between *Bradley* and *Bowen*, have held that retroactive application of a new law is appropriate where Congress clearly intended to overrule recent case law and restore the law to its former state, other courts reject this approach as too speculative. See *Mojica v. Gannett Co.*, 779 F. Supp. 94, 97 (N.D. Ill. 1991) (retroactive application of the Civil Rights Act of 1991 upheld in part on the basis that the Act was meant to "restore" prior law); but see *DeVargas*, 911 F.2d at 1387. By reaffirming *Bowen* as the cardinal rule of statutory construction against retroactivity, this Court would eliminate the expansive dangers inherent in Petitioners' approach. Only prospective application of a new law would be appropriate, absent a clear congressional intent to apply a statute retroactively in order to restore recent prior law.

The potential unfair application of likely federal striker replactment legislation to Midwest's ongoing labor dispute starkly demonstrates the absurdity of Petitioners' position. Under Petitioners' interpretation of *Bradley*, the mere conclusory characterization (albeit erroneous) of federal striker replacement legislation as "restorative" would result in the retroactive application of legislation to Midwest.¹⁸

¹⁸ Proponents of H.R. 5 and S. 55 are characterizing the legislation as "restorative law" designed to overturn the Supreme Court's decisions in *NLRB v. Mackay Radio and Telegraph Co.*,

This result could require the National Labor Relations Board ("NLRB") to find that Midwest retroactively committed an unfair labor practice by hiring some permanent replacements after August 12, 1991 under the newly amended law.¹⁹ See Attachment A for proposed language of H.R. 5 and S. 55 adding 29 U.S.C. § 158(a)(6). Moreover, such a result could turn the current labor dispute on its head by converting the Teamsters strike against Midwest from an economic strike into an unfair

304 U.S. 333 (1938), and *Trans World Airlines v. Independent Federation of Flight Attendants*, 109 S. Ct. 1225 (1989). See note 2 *supra*, at 3. The legislative history of the NLRA conclusively refutes this position and demonstrates that the changes sought by H.R. 5 and S. 55 would alter the long-standing legal right of an employer to permanently replace economic strikers affirmed under the NLRA. The legislative history of the Wagner Act of 1935 (the original NLRA) preserved the right of an employer to hire replacements, whether permanent or temporary. Although the Wagner Act did not address the issue directly, a U.S. Senate Education and Labor Committee memorandum regarding the Wagner bill states:

[The bill] provides that the labor dispute shall be "current," and the employer is free to hasten its end by hiring a new permanent crew of workers and running the plant on a normal basis The broader definition of "employee" in [the bill] does not lead to the conclusion that no strike may be lost or that an employer may not hire new workers, temporary or permanent, at will.

See Senate Comm. on Education and Labor, *Comparison of S. 2926 and S. 1958*, 74th Cong., 1st Sess. 21-22 (1935), reprinted in *A Legislative History of the National Labor Relations Act, 1935*, pp. 1319, 1346 (1985 Reprint, U.S. Government Printing Office).

¹⁹ Ironically, while the Board may not issue a complaint based upon conduct occurring more than six months before filing and service of the charge (29 U.S.C. § 160(b)), the six month limitations period does not begin to run until the party adversely affected receives actual or constructive notice of the unfair labor practice. See *Lehigh Metal Fabricators*, 267 NLRB 568, 114 LRRM 1064 (1983); *Plymouth Locomotive Works*, 261 NLRB 595, 110 LRRM 1155 (1982); *Crown Cork & Seal Co.*, 255 NLRB 14, 107 LRRM 1195 (1981).

labor practice strike. See *NLRB v. Burkart Foam*, 848 F.2d 825 (7th Cir. 1988); *NLRB v. Jarm Enters*, 785 F.2d 195 (7th Cir. 1986); *NLRB v. Charles D. Bonanno Linen Serv.*, 782 F.2d 7 (1st Cir. 1986); *Vulcan-Hart Corp. v. NLRB*, 718 F.2d 269 (8th Cir. 1983). The most significant aspect of an unfair labor practice strike is that strikers are entitled to reinstatement to their former positions upon an unconditional offer to return to work. *Pecheur Lozenge Co.*, 98 NLRB 496, 29 LRRM 1367 (1952), *enforced as modified*, 209 F.2d 393, 33 LRRM 2324 (2nd Cir. 1953). In effect, the economic strikers would be entitled to reinstatement if the NLRB were to find that Midwest committed an unfair labor practice which had the effect of prolonging the economic strike (i.e., that hiring permanent replacements presumptively prolonged Midwest's strike). See *Vulcan-Hart Corp.*, 718 F.2d 269; *Gilberton Coal Co.*, 291 NLRB 344, 131 LRRM 1329 (1988), *enforced*, 888 F.2d 1381 (3rd Cir. 1989). These strikers would have to be reinstated even though Midwest hired permanent replacements. See *Mackay*, 304 U.S. 333.

Moreover, Midwest would be required to terminate its current permanent replacements, even though they were legally hired. See *NLRB v. Elco Manufacturing Co.*, 227 F.2d 675 (1st Cir. 1955), *cert. denied*, 350 U.S. 1007 (1956); *NLRB v. Remington Rand, Inc.*, 130 F.2d 919 (2nd Cir. 1942). Midwest's picture could become even more oppressive because the terminated permanent replacement workers could sue Midwest for breach of contract and misrepresentation in North Dakota state court upon their discharge to make room for reinstatement of the economic strikers. See *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983).²⁰ The weight of such multiple

²⁰ The Supreme Court of North Dakota has upheld similar breach of contract suits. See *Lambott v. United Tribes Educational Technical Center*, 361 N.W.2d 590 (1985).

litigation alone could force Midwest out of business. Indeed, the real world consequences to Midwest of applying federal striker replacement legislation retroactively under *Bradley* based upon mere labels could be staggering.

Therefore, it is in determining a clear congressional intent that judicial review and the principle of fairness embodied in the rule of statutory construction against retroactivity become imperative. Petitioners segregate this critical analysis entirely from the determination of the "plain meaning" and "clear intent" of the statute by misinterpreting *Bradley* to require the retroactive application of any new federal civil legislation which is labeled "procedural" or "restorative". As Midwest has shown, this argument is untenable.

CONCLUSION

Because of the conflicting principle in *Bradley* that retroactivity is *not* unjust and is presumed, the door is open for Congress to pass federal civil legislation (such as the Civil Rights Act of 1991 and the proposed federal striker replacement legislation), without resolving its applicability to current disputes. While such a state of confusion may enable Congress to pass controversial legislation, it improperly allows Congress to shift the burden of deciding the issue of retroactivity onto private litigants and the courts at an exorbitant cost.

Therefore, this Court should guide the lower courts and restore judicial order and economy, should encourage Congress to provide clear intent, and should preserve the important, long-standing origins and purpose of the cardinal rule of statutory construction against retroactivity. The Court would accomplish all of these objectives by reaffirming *Bowen* and overruling *Bradley*. Absent explicit retroactive language or clear congressional intent, legislation must apply only prospectively. This is the bright-line, common-sense rule needed to restore fundamental fairness to the concept of retroactivity.

Based upon the foregoing, Midwest submits that the decisions of the Court of Appeals for the Fifth Circuit in *Landgraf v. USI Film Products*, and of the Court of Appeals for the Sixth Circuit in *Rivers and Davison v. Roadway*, are correct in finding that the Civil Rights Act of 1991 applies prospectively, and should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

EXCERPT OF SECTION 1 FROM H.R. 5 AND S. 55

* * * *

JANUARY 5, 1993

* * * *

A BILL

To amend the National Labor Relations Act and the Railway Labor Act to prevent discrimination based on participation in labor disputes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. PREVENTION OF DISCRIMINATION DURING AND AT THE CONCLUSION OF LABOR DISPUTES.

Section 8(a) of the National Labor Relations Act (29 U.S.C. 158(a)) is amended—

(1) by striking the period at the end of paragraph (5) and inserting “; or”, and

(2) by adding at the end thereof the following new paragraph:

“(6) to promise, to threaten, or to take other action—

“(i) to hire a permanent replacement for an employee who—

“(A) at the commencement of a labor dispute was an employee of the employer

in a bargaining unit in which a labor organization—

“(I) was the certified or recognized exclusive representative, or

“(II) at least 30 days prior to the commencement of the dispute had filed a petition pursuant to section 9(c)(1) on the basis of written authorizations by a majority of the unit employees, and the Board has not completed the representation proceeding; and

“(B) in connection with that dispute has engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection through that labor organization; or

“(ii) to withhold or deny any other employment right or privilege to an employee, who meets the criteria of subparagraphs (A) and (B) of clause (i) and who is working for or has unconditionally offered to return to work for the employer, out of a preference for any other individual that is based on the fact that the individual is performing, has performed, or has indicated a willingness to perform bargaining unit work for the employer during the labor dispute.”

* * * *

JUN 25 1993

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

BARBARA LANDGRAF,

v.

Petitioner,

USI FILM PRODUCTS, BONAR PACKAGING, INC., and
QUANTUM CHEMICAL CORPORATION,

Respondents,

MAURICE RIVERS and ROBERT C. DAVISON,

v.

Petitioners,

ROADWAY EXPRESS, INC.,

Respondent.

On Writs of Certiorari to the
United States Courts of Appeals
for the Fifth and Sixth Circuits

**BRIEF AMICI CURIAE OF THE EQUAL EMPLOYMENT
ADVISORY COUNCIL AND THE CHAMBER OF
COMMERCE OF THE UNITED STATES OF AMERICA
IN SUPPORT OF RESPONDENTS**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

 No. 92-757

BARBARA LANDGRAF,
Petitioner,
 v.

USI FILM PRODUCTS, BONAR PACKAGING, INC., and
 QUANTUM CHEMICAL CORPORATION,
Respondents,

 No. 92-938

MAURICE RIVERS and ROBERT C. DAVISON,
Petitioners,
 v.

ROADWAY EXPRESS, INC.,
Respondent.

On Writs of Certiorari to the
 United States Courts of Appeals
 for the Fifth and Sixth Circuits

**BRIEF AMICI CURIAE OF THE EQUAL EMPLOYMENT
 ADVISORY COUNCIL AND THE CHAMBER OF
 COMMERCE OF THE UNITED STATES OF AMERICA
 IN SUPPORT OF RESPONDENTS**

The Equal Employment Advisory Council ("EEAC") and the Chamber of Commerce of the United States of America ("Chamber") respectfully submit this brief as

amici curiae. The written consents of all the parties have been filed with the Clerk of this Court. This brief argues for affirmance of the decisions of the courts below and thus supports the position of the respondents in both cases.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council is a voluntary association of employers organized in 1976 to promote sound approaches to the elimination of discrimination. Its membership includes over 280 major U.S. companies, as well as several associations which themselves have hundreds of corporate members. The Council's governing body is a Board of Directors composed of experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical as well as the legal aspects of equal employment policies and requirements. The members of EEAC are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The Chamber is the largest federation of business companies and associations in the world. With substantial membership in each of the 50 states, the Chamber represents approximately 215,000 businesses and organizations and serves as the principal voice of the American business community. An important function of the Chamber is to represent the interests of its members in important matters before this Court, the lower courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government. Accordingly, the Chamber has sought to advance those interests by filing briefs in 260 cases of importance to the business community. Many of those cases have been before this Court. For example, *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); and *Hazen Paper Co. v. Biggins*, — U.S. —, 113 S.Ct. 1701 (1993).

Substantially all EEAC and Chamber members, or their constituents, are employers subject to various equal em-

ployment laws, including Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. 1981, the statutes at issue herein. Moreover, many EEAC and Chamber members have made decisions regarding employment relationships, and litigation strategies in pending cases, based upon the state of the law as it existed prior to the enactment of the Civil Rights Act of 1991. P.L. 102-166 (1991).

Because of its interest in the application of the nation's equal employment laws, EEAC, since its founding in 1976, has filed over 320 briefs as *amicus curiae* in cases before this Court, the United States Circuit Courts of Appeals, and various state supreme courts. As a part of this activity, EEAC participated as *amicus curiae* in many of the cases specifically addressed by provisions of the 1991 Act.¹ In addition, following passage of the 1991 Act, EEAC filed extensive comments regarding the issue of its retroactive application with the Equal Employment Opportunity Commission. EEAC also has filed briefs in almost all of the Circuits arguing that the 1991 amendments are not retroactive.² Thus, both EEAC and the Chamber have an interest in, and a familiarity with, the issues and policy concerns presented to the Court in these cases. Indeed, EEAC and the Chamber are uniquely situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties.

¹ Among the cases briefed by EEAC are: *Wards Cove Packing Company v. Atonio*, 490 U.S. 642 (1989); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *EEOC v. Arabian American Oil Co.*, 111 S.Ct. 1227 (1989); *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989); *Martin v. Wilks*, 490 U.S. 754 (1989); and *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988).

² See e.g., *Luddington v. Indiana Bell Tel. Co.*, 966 F.2d 225 (7th Cir. 1992); *Vance v. Southern Bell Tel. & Tel. Co.*, 983 F.2d 1573 (11th Cir. 1993); *Gersman v. Group Health Ass'n*, 975 F.2d 886 (D.C. Cir. 1992); *Rodriguez v. General Motors Corporation*, No. 91-55170 (9th Cir. brief filed on May 13, 1992); and *Atonio v. Wards Cove Packing Co., Inc.*, Nos. 91-35306, 35861 (9th Cir. brief filed on May 1992).

STATEMENT OF THE CASE

These two cases have been consolidated for review by this Court. The first case, *Harvis, Rivers and Davison v. Roadway Express, Inc.*, 973 F.2d 490 (6th Cir. 1992), involves a race discrimination claim brought under Title VII and 42 U.S.C. § 1981. The second case, *Landgraf v. USI Film Products, Bonar Packaging Inc., and Quantum Chemical Corp.*, 968 F.2d 427 (5th Cir. 1992), is a sexual harassment suit filed under Title VII. Both circuits considered the issue of whether the Civil Rights Act of 1991 should be applied retroactively to the plaintiffs' cases.

Both circuits held that the Civil Rights Act of 1991 was not retroactive. In *Harvis*, the court below adopted the reasoning of the courts in *Fray v. Omaha World Herald Co.*, 960 F.2d 1370 (8th Cir. 1992) and *Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir. 1992), *cert. denied*, 113 S.Ct. 86 (1992) which declined to apply § 101 of the 1991 Act to a claim under 42 U.S.C. § 1981 that was pending on appeal at the time of the enactment of the 1991 Civil Rights Act. The court declined to apply the Act retroactively and based its decision on the Act's language and legislative history and the effect the 1991 Act will have on the parties' substantive rights and liabilities.

The *Harvis* court followed *Fray's* analysis of the legislative history of the 1991 Act. In *Fray*, the court examined the retroactive application of § 101 of the Civil Rights Act of 1991, which overruled the Supreme Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). *Fray* held that the 1991 Act was not retroactive since a bill in 1990 specifically making the Act retroactive was vetoed by the President and Congress failed to override the veto. Since Congress deleted the retroactive language because it did not have the votes to override a veto of bill with a retroactive application, the court reasoned that the 1991 Civil Rights Act was prospective in its application. The *Fray* court stated the following:

We think a rather clear picture emerges from this review of the Act and its legislative history. Proponents of retroactively overruling *Patterson* commanded a majority in both houses of Congress, but they could not override the President's veto of a 1990 bill that contained express retroactive provisions. Thus, proponents could do no better than send an ambiguous law to the judiciary.

Fray, 960 F.2d at 1377. The *Fray* court also noted that the sections of the 1991 Act that were made expressly prospective were included by retroactivity opponents to "hedge their bets." *Id.*

The Sixth Circuit also followed *Vogel*, which examined the Act as a whole and concluded that applying the Act retroactively would adversely affect the parties' substantive rights and liabilities. *Harvis*, 973 F.2d at 497. Since the Act would affect substantive rights, the court concluded that the Act should not be applied retroactively. *Harvis*, 973 F.2d at 496-97.

The issue of substantive rights and liabilities was the basis for the Fifth Circuit's decision in *Landgraf*. The court below held that the new availability of a jury trial and compensatory and punitive damages for Title VII claims should not be applied retroactively because it would affect substantive rights and liabilities.

The *Landgraf* court decided that a retroactive application of the Act would result in manifest injustice. In the case of jury trials, for example, the court held,

We are not persuaded that Congress intended to upset cases which were properly tried under the law at the time of trial. . . . To require USI to retry this case because of a statutory change enacted after the trial was completed would be an injustice and a waste of judicial resources. We apply procedural rules to pending cases, but we do not invalidate procedures followed before the new rule was adopted.

Landgraf, 968 F.2d at 432-433.

The Fifth Circuit was equally convinced that the Act's new provisions for compensatory and punitive damages should not be applied to pending cases. The court stated, "Retroactive application of th[ese] provision[s] would result in a manifest injustice. . . . The amended damage provisions of the Act are a seachange in employer liability for Title VII violations." *Id.* at 433. The court continued,

It would be an injustice within the meaning of *Bradley* to charge individual employers with anticipating this change in damages available under Title VII. Unlike *Bradley*, where the statutory change provided only an additional basis for relief already available, compensatory and punitive damages impose 'an additional or unforeseen obligation' contrary to the well-settled law before the amendments.

Id. (quoting *Bradley*, 416 U.S. at 721).

SUMMARY OF ARGUMENT

The courts below properly held that the Civil Rights Act of 1991 is not retroactive, recognizing that the Act's language, legislative history, and effect on substantive rights and liabilities favor a prospective application of the Act to pending cases.

The legislative history of the 1990 conference bill and the 1991 Act clearly demonstrates that the Civil Rights Act of 1991 is to apply only prospectively, because the retroactivity language present in the 1990 bill is absent from the 1991 Act. The 1990 conference bill (S. 2104) contained specific and detailed provisions that provided for a retroactive application of the bill. After the bill passed both the House and the Senate, the President vetoed the bill and stated in his veto message that the bill was vetoed in part because of "unfair retroactivity rules." President's Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 26 Weekly Comp. Pres. Doc. 1632, 1634 (October 22, 1990).

Because Congress could not garner the necessary votes to override the veto, the 1990 Act was not passed into law. When the 1991 Act progressed through Congress, it also initially contained specific language applying most provisions retroactively. However, Congress knew in 1991 that the Civil Rights Act would not be signed into law if it operated retroactively. Therefore, the retroactive language was deleted from the final version of the bill, thus indicating Congress's intent that the 1991 Civil Rights Act not be applied retroactively. Thus, as in *Bradley*, the ultimate exclusion of original language on the retroactivity issue provides evidence that Congress intended an opposite result. *Bradley*, 416 U.S. 716 n.23.

In addition, the two sections of the Act, §§ 402(b) and 109(c), that specifically reject a retroactive application do not create the inference that the remainder of the Act should be applied to pending cases. These sections were added as an insurance policy to protect constituent interests against any remote chance that the Act would be applied retroactively.

The Act also should be applied prospectively because it affects the substantive rights and liabilities of the parties. This Court held in *Bennett v. New Jersey*, 470 U.S. 632 (1985), that "statutes affecting substantive rights and liabilities are presumed to have only prospective effect." *Id.* at 639.

Finally, Congress did not explicitly state that the changes made by the 1991 Act were retroactively restoring prior Congressional intent and thus, those changes should not be applied retroactively.

ARGUMENT

I. THE LANGUAGE AND LEGISLATIVE HISTORY CLEARLY DEMONSTRATE THAT THE 1991 CIVIL RIGHTS ACT WAS INTENDED TO BE PROSPECTIVE ONLY.

A. The President's Veto Of The 1990 Civil Rights Act, Based In Part On The Bill's Retroactivity, Ensured That The 1991 Act Would Be Given Prospective Effect Only.

1. *When Congress ultimately refused to include the retroactivity language from the 1990 civil rights conference bill in the Civil Rights Act of 1991, Congress clearly indicated that the Act should be prospectively applied.*

This Court has considered the issue of whether a statute may be applied retroactively, absent explicit retroactive language. In *Bradley v. School Bd. of Richmond*, 416 U.S. 696 (1974), this Court decided that it was permissible to retroactively apply an attorney's fee statute that took effect during the pendency of an appeal. But the Court so ruled because Congress had deleted language making the bill prospective only. Here, by contrast, Congress dropped language making the bill retroactive, thus evidencing an intent to delete any retroactive effect. This history, therefore, makes the 1991 Act prospective only.

In reaching its decision, the Court in *Bradley* thoroughly examined the legislative history of the statute in order to ascertain and construe the intent of Congress. 416 U.S. at 714. The Court found that the legislative history of the statute provided implicit support for a retroactive application. The Court found that the legislation that ultimately resulted in the attorney's fee statute grew out of a bill that initially had explicitly provided for a prospective application. 416 U.S. at 716 n.23. This prospective application language was deleted, however, in the Senate. *Id.* *Bradley* reasoned, therefore, that the evolution of the language provided implicit support for a

retroactive application. *Id.* Because it was apparent that the provision explicitly providing for prospective application had been stricken during the Congressional negotiations on the bill, the Supreme Court refused to read into the statute the very provision that Congress had eliminated. *Id.*

A similar legislative situation, with an opposite result, is presented in the Civil Rights Act of 1991. Section 15 of the 1990 Civil Rights conference bill (S. 2104—the precursor to the Civil Rights Act of 1991) contained specific and detailed provisions that provided for retroactive application of the bill to “proceedings pending on or after” specific dates. S. 2104, passed by both the House and the Senate, was vetoed by the President on October 22, 1990. 136 Cong. Rec. S16418. The President's veto message indicated that the bill was vetoed in part because of “unfair retroactivity rules.” President's Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 26 Weekly Comp. Pres. Doc. 1632, 1634 (October 22, 1990).

In the next Congress, H.R. 1, the forerunner of the Civil Rights Act of 1991, initially contained almost the same retroactivity language as the vetoed 1990 bill. The original version of H.R. 1 contained the following language pertaining to the retroactive application of the bill to pending cases:

- (1) Section 102 shall apply to all proceedings pending on or commenced after June 5, 1989;
- (2) Section 103 shall apply to all proceedings pending on or commenced after May 1, 1989;
- (3) Section 104 shall apply to all proceedings pending on or commenced after June 12, 1989;
- (4) Sections 105(a)(1), 105(a)(3) and 105(a)(4), 105(b), 106, 107, 108, and 109 shall apply to all proceedings pending on or commenced after the date of enactment of this Act;

(5) Section 105(a)(2) shall apply to all proceedings pending on or commenced after June 12, 1989; and

(6) Section 110 shall apply to all proceedings pending on or commenced after June 15, 1989.

See H.R. 1, 102nd Cong. 1st Sess. 113 (1991).

In addition to the above rules, H.R. 1 also contained complicated transition rules governing the application of the Act to orders already entered in pending cases. *Id.* This language was virtually identical to Section 15 of S. 2104, the failed 1990 bill. Although H.R. 1 passed the House, President Bush stated that he would veto the bill in that form. When the final Senate compromise was worked out, the retroactivity language was removed in the Senate version and it does not appear in the bill as ultimately enacted into law. Compare Section 402 with H.R. 1, 102nd Cong., 1st Sess. 113 (1991).

The specific deletion of the retroactivity provision illustrates Congress's desire to make the 1991 Act prospective only. Congress needed to present a bill to the President that operated prospectively because the President had stated that he would veto a bill with a retroactive application. Since Congress, as evidenced by its experience with the 1990 Act, did not have the necessary votes to override a presidential veto, it opted for language that the President would sign, and that language included a prospective application of the Act.

The court in *Fray v. Omaha World Herald Co.*, 960 F.2d 1370, agreed with this analysis:

[T]he President [in 1990] vetoed a bill containing an explicit retroactivity provision. That veto could not be overridden and a compromise bill omitting those provisions was then enacted. Whatever ambiguities may be found elsewhere in the Act and its legislative history, we think this history is dispositive, even under *Bradley*. When a bill mandating retroactivity fails to pass, and a law omitting that man-

date is then enacted, the legislative intent was surely that the new law be prospective only; any other conclusion simply ignores the realities of the legislative process.

Id. at 1378.

In *Maddox v. Norwood Clinic*, 783 F. Supp. 582 (N.D. Ala. 1992), the District Court also held that the omission of retroactive language from the 1990 bill was indicative of Congress's intent to apply the 1991 Act prospectively.

This legislative history demonstrates that Congress knew how to provide for retroactivity when it intended to do so; it also suggests that retroactivity was one of the issues on which compromise was necessary. The 1990 bill called for retroactivity but was vetoed, while the 1991 bill does not call for retroactivity; this indicates to the court a collective intent on the part of Congress to eliminate retroactive application of the statute. More importantly, the fact that H.R.1 (1991) had the retroactive language in it and S.1745 (1991) does not, coupled with the fact that the Act does not have the retroactive language, is even stronger evidence of this collective congressional intent. The court is satisfied that Congress did not intend retroactive application of the Act.

Id. at 585.

2. *The House's 1991 handling of the Bush Administration's alternative to H.R. 1 was different from Congress's deletion of retroactive language from H.R. 1 and thus does not indicate a retroactive application of the 1991 Act.*

On June 4, 1991, Rep. Michel offered the Bush Administration's alternative to H.R. 1, containing, among other things, a prospective application of the enactment section. The bill did not pass the Senate. The fact that the Administration's proposal did not garner a majority in the Senate is not, as the petitioners and supporting

amici argue, proof that the 1991 Act should be applied retroactively. Several factors differentiated the Senate's handling of the Administration's proposal from the vetoed 1990 Civil Rights bill.

The Administration's proposal, for example, was not a referendum on the issue of retroactivity. The debate centered on discussions of five Supreme Court decisions that Congress wanted either to modify or overturn—not on the prospective application of the Act. In fact, during debate on the Administration proposal, no discussion occurred regarding the prospective nature of Section 15. 137 Cong. Rec. H3897-H3909 (daily ed. June 4, 1991) (Discussion of H.R. 1357, the Michel substitute). Further, the bill was voted on *in toto* and the effective date provision was not taken up separately. Finally, it was clear to Congress from the President's 1990 veto message that a bill containing retroactivity rules would not be signed into law and that to be successful, a legislative proposal must not be retroactive. The treatment of the Administration's proposal, therefore, differs markedly from Congress's action on H.R. 1 which involved the deletion of specific retroactivity language.³

B. Floor Statements And Section-by-Section Analyses Submitted By The Prime Movers Of The 1991 Compromise Bill Clearly Demonstrated That The Act Would Operate Prospectively Only.

In addition to the deletion of the 1990 retroactivity language, statements by key Senate sponsors of the Civil Rights Act of 1991 further support the conclusion that a retroactive application of the Act was explicitly rejected. Senator Dole, in a section-by-section analysis of the bill,⁴

³ But see, *Estate of Reynolds v. Martin*, 985 F.2d 470, 477 (9th Cir. 1993) and *Mozee v. Am. Commercial Marine Service Co.*, 963 F.2d 929, 933 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 207 (1992).

⁴ Senators Burns, Cochran, Garn, Gorton, Grassley, Hatch, Mack, McCain, McConnell, Murkowski, Simpson, Seymour and Thurman

clearly and unambiguously explained that the Act and its amendments do not apply to cases pending or arising before the date of enactment. 137 Cong. Rec. S15472-15478.

Senator Danforth—the primary architect of the final compromise Act—argued that the bill was intended to be applied prospectively, in accordance with Supreme Court principles of interpretation requiring statutes to be given prospective application only, unless Congress explicitly directs otherwise, citing *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 110 S.Ct. 1570, 1579 (1990) and *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988). 137 Cong. Rec. S15483 (daily ed. Oct. 1991). Senator Danforth noted that he and the sponsors of the Act rejected the Supreme Court's analysis in *Bradley* as the relevant framework for interpreting the question of retroactivity of a bill. Following this statement, Senator Danforth introduced into the record an Interpretive Memorandum, expressing the intent of the original cosponsors of S. 1745 (except Senator Kennedy), which stated that "[t]he bill provides that, unless otherwise specified, the provisions of this legislation shall take effect upon enactment and shall not apply retroactively." 137 Cong. Rec. S15485 (daily ed. Oct. 30, 1991).

II. SECTIONS 402(b) AND 109(c) OF THE CIVIL RIGHTS ACT OF 1991 DO NOT EVIDENCE AN INTENT TO APPLY THE REMAINING PROVISIONS OF THE ACT RETROACTIVELY.

A. The Language Of The *Wards Cove* Exception Does Not Evidence Any Congressional Intent To Apply The Remainder Of The Act Retroactively.

Adding to the prospective retroactive application debate was § 402(b) of the Act, the so-called *Wards Cove*

endorsed this section-by-section analysis, as did the Bush Administration. 137 Cong. Rec. S15472.

amendment.⁵ This provision specifically states that the Act should only be applied prospectively to certain disparate impact cases. Section 402(b) reads as follows:

Notwithstanding any other provisions of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983 [*i.e.*, the *Wards Cove* case].

This section is the primary basis for arguments that the rest of the statute must be applied retroactively. Senator Dole, however, clearly discredited this argument when he introduced into the record a "Legislative History, Technical Corrections" memorandum. The memo states in relevant part,

Section 402 of the Act, and this amendment to section 402 . . . will not apply to cases arising before the effective date of the Act . . . absolutely no inference is intended or should be drawn from the language of this amendment to section 402 that the provision of the Act or the amendments it makes may otherwise apply retroactively to conduct occurring before the date of enactment of this Act. Such retroactive application of the Act and its amendments is not intended . . . [n]ot only would retroactive application of the Act and its amendments to conduct occurring before the date of enactment be contrary to the language of section 402 and this amendment, but it would be extremely unfair.

⁵ Section 402(b) was inserted at the insistence of Alaska Senators Murkowski and Stevens, who were motivated by constituent interests and a desire to avoid the battle over retroactivity foreseen by Senator Kennedy. The Senators from Alaska wanted to ensure that the *Wards Cove* Packing Company would not be covered by the 1991 Act. Their floor statements clearly and unambiguously state that "[a]bsolutely no inference is intended or should be drawn from the language of this amendment to Section 402 that the provisions of the Act or the amendments it makes may otherwise apply retroactively to conduct occurring before the date of enactment of this Act." 137 Cong. Rec. S15953 (daily ed. Nov. 5, 1991).

The full text of the memorandum can be found at 137 Cong. Rec. S15953 (daily ed. Nov. 5, 1991).⁶

Even Senator Kennedy, in his statements on the Senate floor both before and after the addition of the *Wards Cove* amendment, did not state that retroactive application of the bill was his intention or the intention of the collective body. Instead, he stated that the courts will determine whether the bill will apply to cases and claims that were pending on the date of enactment. 137 Cong. Rec. S15485. Senator Kennedy acknowledged that he disagreed with the supporters of the bill on the issue of nonretroactivity. *Id.*

Finally, Section 402(b) would not be rendered meaningless if it were not used to make the 1991 Act generally retroactive. As the legislative history clarifies, this par-

⁶ Following Senator Dole's analysis of the *Wards Cove* amendment, Senator Durenberger also asserted that the bill was to be applied prospectively:

I want to be clear that this vote does not change my view that the bill is completely prospective. . . [s]ome may attempt to argue at a later date that [the *Wards Cove* exemption] creates an inference that the bill, in general, is retroactive. . . that is the wrong conclusion to draw from this resolution. . . [w]e all know that the bill applies prospectively because that is what the plain language of the civil rights bill states.

The full text of Senator Durenberger's statement may be found at 137 Cong. Rec. S15966 (daily ed. Nov. 5, 1991).

Senator Simpson also agreed that the provisions of the Civil Rights Act were to be applied prospectively and that adoption of the *Wards Cove* amendment did not alter that aspect of the bill's application:

By including specific language to make it clear that the *Wards Cove* Co. will not be treated retroactively, I in no way am implying that all other companies with litigation pending on the date of enactment should be treated retroactively. To the contrary, I read section 402 of S. 1745 to apply the bill prospectively to all parties, so that no one with litigation pending on the date of enactment would have the rules changed on them.

Id.

ticular section was added for the specific and exclusive purpose of making absolutely certain that the disparate impact provisions would *not* apply to the Wards Cove Packing Company in its pending litigation, a company that had invested 24 years to defending a claim of disparate impact discrimination. 137 Cong. Rec. S15953, S15963, S15966 (daily ed. Nov. 5, 1991). *See also* *Fray v. Omaha World Herald Co.*, 960 F.2d at 1376; *Mozee v. Am. Commercial Marine Serv. Co.*, 963 F.2d at 933; and *Thompson v. Johnson & Johnson Mgmt. Info. Crt.*, 783 F. Supp. 893, 895 (D.N.J. 1992).

B. The Non-Retroactive Language In The Extraterritorial Exception Does Not Indicate That Congress Intended The Act Generally To Apply To Pending Cases.

Nor does the language of the extraterritorial exception in § 109(c) convey a congressional directive to apply the remainder of the Act's provisions retroactively. Section 109(c), which relates to extraterritorial application, states that "[t]he amendments made by this section shall not apply with respect to conduct occurring before the date of the enactment of this Act." Like Section 402(b), this section relates specifically to a case recently adjudicated by the Supreme Court, *EEOC v. Arabian Am. Oil Co.*, 111 S.Ct. 1227 (1991). *Fray v. Omaha World Herald Co.*, 960 F.2d at 1376; *Maddox v. Norwood Clinic, Inc.*, 783 F. Supp. at 584 ("Section 109(c) is known as the 'American Arabian exception' in reference to the Supreme Court's decision in *EEOC v. Arabian American Oil Co.*, . . ."). *See also* *Guillory-Wuerz v. Brady*, 785 F. Supp. 889 (D.Co. 1992).

Thus, because §§ 402(b) and 109(c) were included for clear, self-contained, and limited purposes, no inferences about the retroactive application of the remaining provisions of the Act can be drawn from either § 402(b) or § 109(c). *Mozee*, 963 F.2d at 932-33; *Johnson v. Uncle Ben's Inc.*, 965 F.2d 1363, 1373 (5th Cir. 1992).

C. The Circuits That Applied The Act Only Prospectively Have Found That Section 109(c) And 402(b) Were Only To Be Reassurances That The Act Will Not Apply To Specific Cases.

Six circuits have considered and rejected the argument that the prospective language in §§ 109(c) and 402(b) indicates an intent to apply the rest of the 1991 Act retroactively. *Butts v. City of N.Y. Dept. of Housing*, 61 Fair Empl. Prac. Cas. (BNA) 579 (2nd Cir. 1993); *Vance v. Southern Bell Tel. & Tel. Co.*, 983 F.2d 1573, 1557 (11th Cir. 1993); *Gersman v. Group Health Ass'n*, 975 F.2d at 890 (D.C. Cir.); *Johnson v. Uncle Ben's, Inc.*, 965 F.2d at 1373 (5th Cir.); *Mozee*, 963 F.2d at 933 (7th Cir.); and *Fray*, 960 F.2d at 1377 (8th Cir.). These courts have determined that the prospective language should be construed merely as an extra assurance that the Act will not apply to specific cases.

The court in *Butts* held that the inclusion of the two provisions did not mean that the Act as a whole was retroactive. The court stated,

[T]here is no suggestion that either [§§ 402(b) and 109(c)] was added against a background assumption that Congress intended the entire Act to be retroactive. They seem to have been inserted by individual legislators to protect constituent interests against the possibility that the statute ultimately would be held retroactive in the full knowledge that the retroactivity question was an open one that could go either way in the courts. The floor statements of Senators Dole and Murkowski that no inference should be drawn from the addition of § 402(b) considerably bolster this conclusion.

Butts, 61 Fair Empl. Prac. Cas. (BNA) at 588.

The *Vance* court also found that §§ 109(c) and 402(b) did not indicate that the Act is retroactive. *Vance* considered and rejected the holding of *Davis v. City and County of San Francisco*, 976 F.2d 1536 (9th Cir. 1992),

which stated that the prospective only nature of the two provisions confirmed that Congress intended the Act to apply retroactively. The *Vance* court was unpersuaded by the *Davis* court's reasoning:

The negative inference (that Congress intended general retroactivity) that the *Davis* court drew from sections 109(c) and 402(b) is an unhelpful legal fiction given the reality of a sharp conflict between legislators on the retroactivity of the Act generally. . . . Congress probably only intended for sections 109(c) and 402(b) to minimize, in specific instances, the risk posed by uncertain outcomes in the courts on the general retroactivity issue. And when a court holds that the Act *generally* applies prospectively, the court does not render sections 109(c) and 402(b) 'entirely redundant' nor inoperative. Those sections operate to ensure that although *some* court might hold the Act retroactive as a general matter, *no* court may hold that the Act applies in *Wards Cove* or in a section 109 case where the conduct predates enactment.

Id. at 1577 n.9 (citations omitted).

In *Gersman*, the District of Columbia Circuit indicated that §§ 109(c) and 402(b) could possibly be viewed "not as redundancies, but rather as insurance policies." *Gersman*, 975 F.2d at 890. The *Gersman* court also noted that it was certainly reasonable for the Alaska legislators to wish to reassure the *Wards Cove* defendants that the Act would not apply to the 24 year-old discrimination case, given the potentially drastic impact of retroactive application of the Act to the company. *Id.*

The Seventh Circuit in *Mozee* also refused to find the prospective language of §§ 109(c) or 402(b) as probative of congressional intent, recognizing that these sections were merely extra "assurance[s]." 963 F.2d at 933, and the court in *Fray* echoed this sentiment. 960 F.2d at 1377. Likewise, in *Johnson v. Uncle Ben's, Inc.*, the Fifth Circuit criticized the 109(c) 402(b) argument as

"too much negative implication." 965 F.2d at 1373. The *Johnson* court indicated that the negative implication argument was unpersuasive given the remainder of the Act's history. *Id.*

Thus, six circuits held that §§ 402(b) and 109(c) do *not* allow an inference that the Act as a whole would be applied retroactively. Because the sections are merely additional assurances that the Act will not be applied retroactively to specific cases, they should not be used to impute a retroactive effect to the Civil Rights Act of 1991.

III. IN ADDITION TO THE LEGISLATIVE HISTORY'S PROSPECTIVE APPLICATION, THE CIVIL RIGHTS ACT OF 1991 AFFECTS SUBSTANTIVE RIGHTS AND LIABILITIES OF INDIVIDUALS AND THEREFORE MUST BE APPLIED PROSPECTIVELY.

A. This Court Held In *Bennett* That A Statute Is Applied Prospectively When It Affects Substantive Rights And Liabilities. Since The Civil Rights Act Of 1991 Affects Substantive Rights And Liabilities, It Must Be Applied Prospectively.

This Court has dealt with the issue of retroactivity of statutes in two ways. One line of cases begins with *Bradley v. School Bd. of Richmond*, 416 U.S. 696 (1974). In *Bradley*, the plaintiffs brought an action to compel desegregation of the public schools of Richmond. While the case was on appeal, Congress enacted § 718 of the Education Amendments of 1972, 20 U.S.C. § 1617, which granted federal courts authority to award attorneys fees to a prevailing party in a school desegregation case. The court of appeals ruled that the provision had prospective effect only, but this Court reversed.

In arriving at this conclusion, this Court held,

[A] court is to apply the law in effect at the time it renders its decision unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.

Id. at 711. In elaborating on this rule, this Court stated that an intervening change will not be applied to a pending action where it "would infringe upon or deprive a person of a right that had matured or become unconditional." *Bradley*, 416 U.S. at 720.⁷

Against this backdrop and in a second line of authority, *Bowen v. Georgetown University*, 488 U.S. 204 (1988) reiterated the principle that, "Retroactivity is not favored in law. Thus, Congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Id.* at 208.

The tension between *Bradley* and *Bowen* was revisited by the Court in *Bennett v. New Jersey*, 470 U.S. 632 (1985). In *Bennett*, the federal government was trying to recover from the state of New Jersey federal grant funds allegedly misused during the years of 1970-72. While the case was pending, Congress amended the statute governing grants in 1978. In holding that the Act would be applied prospectively, the *Bennett* court noted the *Bradley* court's limitation on the retroactive application of statutes: a court will not retroactively apply a statute when "to do so would infringe upon or deprive a person of a right that had matured or become unconditional." *Bennett*, 470 U.S. at 639.

The *Bennett* court concluded: "This limitation comports with another venerable rule of statutory interpretation, *i.e.*, that statutes affecting substantive rights and liabilities are presumed to have only prospective effect." *Bennett*, 470 U.S. at 639. Thus, according to this Court in *Bennett*, a statute that affects substantive rights and

⁷ As noted above, however, *Bradley* indicated that the ultimate exclusion of original language on the retroactivity issue provided evidence of congressional intent on this issue. Thus, where initial language on point is deleted, an inference of an opposite congressional intent can be drawn.

liabilities will have prospective effect only. *See also De-Vargas v. Mason & Hanger-Silas Mason Co., Inc.*, 911 F.2d 1377, 1393 (10th Cir. 1990), *cert. denied*, 111 S.Ct. 799 (1991) (Restoration Act would not be applied retroactively because it affected a substantive right by imposing substantive liability on defendants in their individual capacities).

The *Bennett* decision has been the basis of several circuit court opinions concerning the effective date of the Civil Rights Act of 1991. The Court of Appeals for the District of Columbia Circuit, for example, followed *Bennett* and agreed that a statute affecting substantive rights should be applied prospectively. *Gersman v. Group Health Ass'n*, 975 F.2d 886 (D.C. Cir. 1992). As in the instant case (*Harvis*), the court in *Gersman* was presented with the issue of whether the Civil Rights Act of 1991 should be applied retroactively to a claim alleging discrimination in the termination of a contract.

The court, after examining *Bradley*, *Bowen*, and *Bennett*, held that statutes that affected substantive rights should be applied prospectively only. The court stated the following:

The Supreme Court in *Bennett* did not purport to overrule *Bradley*. But it noted that the *Bradley* decision concerned allowance of attorney fees, while acknowledging the continued vitality of the 'venerable rule of statutory interpretation' followed in *Security Industrial* and *Greene* as applicable to 'substantive rights and liabilities.' Therefore, we conclude that the Court has given us the basis upon which we must now distinguish the applicability of the two presumptions. The *Bowen* presumption must apply in the case of changes in substantive law. That being said, and *Bradley* still apparently being recognized by the Supreme Court, we agree with the Fifth Circuit that the *Bradley* presumption of applicability of law as of the time of decision must per-

tain to 'remedial provision[s]—not substantive obligations or rights under a statute.'

Gersman, 975 F.2d at 898-899 (citations omitted). *Accord Johnson*, 965 F.2d 1363, 1374 (5th Cir. 1992); *Mozee*, 963 F.2d at 936 (7th Cir.); and *Banas v. Am. Airlines*, 969 F.2d 477, 483 (7th Cir. 1992). See also *Vogel v. City of Cincinnati*, 959 F.2d 594, 598 (6th Cir. 1992). Thus, a statute that affects substantive rights and liabilities should be applied prospectively.

B. Application Of The Provisions Of The Civil Rights Act Of 1991 Would Substantively Change The Rights Of The Parties To Litigation Pending At The Time Of Enactment.

The provisions of the Civil Rights Act of 1991 make substantive changes to the state of the law as codified by Title VII and 42 U.S.C. § 1981 by eliminating affirmative defenses, expanding the type of conduct that is actionable, providing jury trials for certain cases, and providing additional damages that were not previously available.

1. The provisions permitting jury trials and punitive and compensatory damages are substantive changes to the law.

Prior to the enactment of the Civil Rights Act of 1991, allegations pursued under Title VII were tried before a judge, and awards to successful claimants were limited to back pay and/or reinstatement and injunctive relief. Under the 1991 Act, employers can now be held liable for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses," as well as punitive damages for conduct engaged in with "malice or reckless indifference." See Section 102. In *Johnson v. Rice*, 58 Fair Empl. Prac. Cas. (BNA) 31 (S.D. Ohio 1992), finding that employers could theoretically be held liable for an additional \$300,000 in compensatory damages to each plaintiff, the court indicated that "[s]uch a substantial

increase in a defendant's potential liability clearly 'creates a new liability in connection with a past transaction,' and leads to the inescapable conclusion that the compensatory damages provision of the Act is substantive in nature. . . ." *Id.*, at 34 (citations omitted).

Similarly, in *Maddox v. Norwood Clinic*, 783 F. Supp. 582 (N.D. Ala. 1992), the court agreed that the changes made by the Act are substantive. *Id.* at 586. Therefore, remedies such as these, where they were not previously available in the field of employment law, are substantive changes.

Moreover, under pre-Act law, a fundamental tenet of employment discrimination law is to "make persons whole for injuries suffered on account of employment discrimination." See, *Albemarle Paper Company v. Moody*, 422 U.S. 405, 418 (1975). Thus, the victims of discrimination should be, "so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." *Albemarle Paper Co.*, 422 U.S. at 421 (quoting 118 Cong. Rec. 7186 (1972)). As illustrated above, the Civil Rights Act of 1991 changes this basic scheme by making punitive damages available, as well. See Section 102. The purpose of punitive damages is not to make the victim of discrimination whole, but to punish a bad actor. *Memphis Community School District v. Stachura*, 477 U.S. 299, 307 n.9 (1991). Thus, the availability of punitive damages is a radical departure from employment discrimination theory as practiced prior to the Civil Rights Act of 1991. Therefore, it is clear that the Civil Rights Act of 1991 substantively changes the law in order to provide new, additional types of damages for victims of unlawful conduct.

2. Other provisions of the Act eliminate substantive defenses previously available to employers.

In addition to providing for a jury trial and compensatory and punitive damages where intentional discrimina-

tion is alleged, the Act eliminates several substantive defenses that were available to employers under prior law. For example, section 101 of the Act reverses the Supreme Court's 1989 decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), to make post contract-formation conduct actionable under § 1981 of the Reconstruction Era Civil Rights Act. In *Patterson*, the Supreme Court had concluded that the language of § 1981 covered discrimination only in the formation of contractual relationships, such as hiring decisions, and under limited instances, promotion decisions. The Act amends § 1981 to extend its coverage to all conduct pursuant to the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship. See Section 101.

Section 107 of the Act reverses the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 109 S.Ct. 1775 (1989), which relied upon prior law in *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977), effectively eliminating the "same decision" defense. Prior to the 1991 Act, selection decisions shown to have been motivated in part by discrimination were not unlawful if the employer could prove it would have taken the same action based upon nondiscriminatory criteria. Section 107 eliminates this defense on the liability question by making the selection decisions at issue unlawful even if the employer can prove that other lawful factors would have caused it to make the decision. See Section 107.

These provisions of the 1991 Act, in addition to others which reverse specific Supreme Court decisions, e.g., *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989) and *Martin v. Wilks*, 490 U.S. 754 (1989), are substantive in nature. See Sections 108 and 112. Decisions made during the course of an employment relationship based upon the state of the law prior to the Act may no longer be defensible because of the elimination of affirmative de-

fenses. Likewise, many employers faced with discrimination lawsuits may have made decisions during an investigation and the trial preparation that they might have made differently had they anticipated the elimination of these substantive defenses and the addition of the new remedies provided by the 1991 legislation.

It is of paramount importance that parties to a lawsuit have concrete, predictable standards by which to evaluate each case. Clearly, changing the rules of the game after discovery, trial preparation, and a hearing on the merits will substantially alter the rights of the employer in cases pending on the day of enactment.

Because the Civil Rights Act of 1991 affects substantive rights, the Act should be given prospective application only.

C. The Civil Rights Act Of 1991 Is Not Merely "Restorative"; The Act Affects Substantive Rights And Liabilities And Thus Must Be Applied Prospectively. An Explicit Intent To Restore The Law Retroactively Is Necessary For A Retroactive Application; Inferring Retroactive Intent Is Not Enough.

Any argument that the Civil Rights Act of 1991 is merely "restorative" and, therefore, should be interpreted retroactively is contrary to law and fact and must fail. The standard of clear congressional intent for the retroactive application of statutes requires articulated and clear statements on retroactivity, not inferences drawn from the general purpose of the legislation. *DeVargas v. Mason & Hanger-Silas Mason Co., Inc.*, 911 F.2d 1377, 1387 (10th Cir. 1990). See also *Fray v. Omaha World Herald Co.*, *supra*. *Contra Ayers v. Allain*, 893 F.2d 732 (5th Cir. 1990) (The 1987 Restoration Act amendments held to be applicable to pending litigation based upon inferences attributed to the purpose of the statute).⁸

⁸ The Fifth Circuit's opinion in *Ayers v. Allain* does not support application of the 1991 Act to pending cases, because the language

In *DeVargas*, the Tenth Circuit refused to interpret statutory language indicating Congress's desire to address certain Supreme Court decisions as "clear congressional intent" to restore retroactively. *Id.* at 1385. Indeed, *DeVargas* indicated that even when Congress expresses a restorative intent, retroactive application is not appropriate absent a clearer expression of purpose to apply the Act to pending cases. The text of the statute at issue in *DeVargas* contained the following provision:

- (1) certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of . . . section 504 of the Rehabilitation Act of 1973 . . . ; and
- (2) legislative action is necessary to *restore* the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered.

Id. at 1384 (quoting Restoration Act § 2, 102 Stat. at 28 (1988) (emphasis added)). The court also noted that the Senate report contained similar language, purporting to "overturn the Supreme Court's 1984 decision in *Grove City College v. Bell*, 465 U.S. 555, 104 S.Ct. 1211, and to restore . . . the four major civil rights statutes that

and history of the Civil Rights Restoration Act of 1987 is significantly different from that of the 1991 Act. The 1987 Act states that its purpose is to "restore" the law. The 1991 Act's purpose is to provide "additional remedies." Moreover, the *Ayers* court failed to discuss *Bradley* or *Bowen* and did not recognize that both *Bradley* and *Bowen* will not apply a statute retroactively where the legislative history shows that prior retroactive language has been deleted prior to final passage. *Ayers*, however, does cite to a district court decision relying on uncontested floor statements that the bill was intended to apply to pending cases. *Leake v. Long Island Jewish Medical Ctr.*, 695 F. Supp. 1414, 1417 (E.D.N.Y. 1988). By contrast, the 1991 Act's history is replete with numerous statements rejecting retroactive application. In any event, *DeVargas* demonstrates that *Leake's* reliance on an individual floor statement is misplaced. 911 F.2d at 1386.

prohibit discrimination in federally assisted programs." *Id.* at 1384-1385.

Despite the clear intent to "restore" the law, the court held that there was "clear congressional purpose to overturn *Grove City College*, but no clear expression of intent regarding retroactive application of the Act's amendments." *Id.* at 1385. The court found

[t]hat the expressed congressional intent in the Senate report to 'restore' section 504 to its pre-*Grove City College* interpretation reflects unambiguously only Congress's purpose to reverse the Supreme Court's program-specific reading of federal prohibitions on discrimination by programs or activities receiving federal financial assistance. Because we must find clear congressional intent to invoke retroactivity, we cannot read 'restore' to mean 'retroactively restore,' particularly where the effect of such a reading would be to impose substantive liability for actions committed in reliance on *Grove City College* and its progeny prior to the passage of the Restoration Act in 1988.

Id.

The language of the Civil Rights Act of 1991 indicating that Congress acted in response to "recent decisions of the Supreme Court" does not evidence an intent to apply the provisions of the Act retroactively. In *Fray v. Omaha World Herald Co.*, the court noted that it searched long and hard and could not find anything in the Act or its legislative history which would indicate that retroactive overruling of *Patterson* was the intent of the legislature. *Fray*, 960 F.2d at 1377. For example, Section 2 of the 1991 Act finds that "additional" protections against discrimination are being provided; the word "restore" is not used. Moreover, the language in Section 3 of the Act clearly indicates that Congress intended to *expand* the law as articulated in certain Supreme Court decisions. See Section 3. Under *DeVargas* and *Fray*, this language alone

cannot be interpreted as a collective intent to apply the provisions of the bill retroactively.

The court in *DeVargas* also cautions that to apply the provisions of a new law retroactively merely because the new law rejects a judicial interpretation is inconsistent with the constitutional division of authority between Congress and the Supreme Court. *Id.* at 1387. *See also Fray*, 960 F.2d at 1375. ("The presumption against retroactive application best preserves the distinction between courts and legislatures. The former usually act retrospectively . . . and the latter usually act prospectively"). The doctrine of separation of powers emphasizes that although it is Congress's prerogative to make the laws, the authority to interpret the law lies exclusively with the judiciary. *DeVargas*, 911 F.2d at 1387-1388, citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803); *See also, The Federalist* No. 78, at 116 (A. Hamilton) (H. Commager ed. 1949).

DeVargas emphasized,

This rule of retroactive application of judicial decisions flows directly from the Court's function of interpreting law. Stated simply, what the Court interprets the law as saying is what the law says. Congress, of course, has the power to change the law and may amend the law to comport with either its own or the (perceived) intentions of the Congress which originally enacted the law. These congressional amendments, however, cannot undo the Supreme Court's authoritative construction of the original statute. When a *subsequent Congress* amends the law in response to the Supreme Court's interpretation, it does not revive the original enacting Congress's interpretation of the statute which existed before the Supreme Court's interpretation. Rather, the result of a subsequent Congress's 'restoration' efforts is newly created law. As with any newly enacted legislation, Congress must state clearly its intentions with regard to retroactivity.

DeVargas, 911 F.2d at 1388 (emphasis added).

Moreover, application of the Civil Rights Act of 1991 to cases pending on its day of enactment raises additional constitutional questions. Where a new law contains punitive damages provisions, retroactive application may result in constitutional ex post facto and due process violations. *Louis Vuitton S.A. v. Spencer Handbags Corp.*, 765 F.2d 966 (2nd Cir. 1985) (declining to apply the Trademark Counterfeiting Act retroactively because to do so would present constitutional issues.) In *Louis Vuitton*, the Second Circuit refused to find that the retroactive application of the Act at issue would violate either the Ex Post Facto clause or the Due Process clause; however, "the presence of these concerns supports our preference for strictly prospective application." *Id.* at 972. Therefore, if retroactive application implicates such constitutional problems, prospective application of the statute is the better course. *Id.* In the cases at bar, the prospect of applying the 1991 Act to cases pending on its enactment date raises the specter of several constitutional questions. Thus, the wisest choice is to apply the statute prospectively.

CONCLUSION

The history of the Civil Rights Act of 1991 demonstrates the wisdom of *Bowen's* rule that retroactivity is not favored in law and that a statute should not be applied to pending cases unless Congress clearly expresses that intent. Indeed, it seems only logical that legislators who want a bill to apply to pending cases should be required to say just that.

Here, however, proponents of this legislation have failed to fulfill this basic requirement. They roundly criticized several of this Court's decisions as misinterpreting Congressional intent and claimed that they could do better. Ironically, the bill they crafted has generated thousands of hours of unnecessary attorney time just on the threshold question of the Act's effective date. Therefore, we urge the Court to apply the *Bowen* requirement that Congress must state clearly when a statute is retroactive. Perhaps

such a ruling will encourage Congress to say what it means instead of leaving its unfinished business to be sorted out by frustrated judges and litigants.

For the foregoing reasons, the *amici curiae* respectfully urge this Court to hold that the Civil Rights Act of 1991 does not apply to cases pending on the date of enactment.

Respectfully submitted,

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Nos. 92-757 and 92-938

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

BARBARA LANDGRAF, *Petitioner*
v.
USI FILM PROD., et al., *Respondents*.

MAURICE RIVERS, et al., *Petitioner*,
v.
ROADWAY EXPRESS, INC., *Respondent*.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURTS OF APPEALS
FOR THE FIFTH AND SIXTH CIRCUITS

BRIEF OF WARDS COVE PACKING COMPANY,
AMICUS CURIAE, ON BEHALF OF RESPONDENTS

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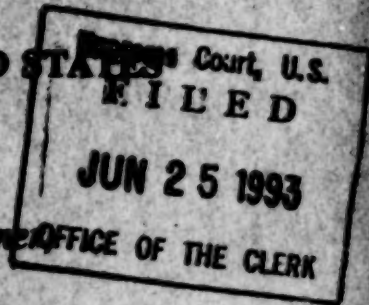


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I. INTEREST OF *AMICUS CURIAE*

Amicus curiae Wards Cove Packing Company, Inc.

operates salmon canneries in Alaska and has its principal office in Seattle, Washington.¹ The company and Dole Food Company, Inc. were the petitioners in Wards Cove Packing Company, Inc. v. Atonio, 490 U.S. 642 (1989). This Court there held that plaintiff in a Title VII² action bears the burden of isolating and identifying the specific employment practices allegedly responsible for statistical disparities in the composition of the work force; that racial imbalance in one segment of an employer's work force is not sufficient to establish a *prima facie* case of unintentional discrimination ("disparate impact") with respect to the selection of workers in other segments of the employer's work force; and delineated the parties' respective burdens of

¹ The parties have consented to the filing of this brief. The letters of consent are being filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

² Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

proof. Accordingly, the Court reversed and remanded the underlying court of appeals decision, Atonio v. Wards Cove Packing Co., Inc., 827 F.2d 439 (9th Cir. 1987).

In response to portions of Wards Cove and to several other decisions,³ Congress passed the Civil Rights Act of 1991. The House Report on the Act said that the Supreme Court ruled in Wards Cove that once a complaining party proves an employment practice has a disparate impact, the employer has only the burden of production, not the burden of persuasion in justifying the practice. H.R. Rep. No. 102-40(I), 102nd Cong., 1st Sess., 29 (1991).

The Congress in enacting the 1991 Act stated:

The Congress finds that —

* * *

³ The Civil Rights Act of 1991 also addresses Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), Martin v. Wilks, 490 U.S. 755 (1989), Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989), and Patterson v. McLean Credit Union, 491 U.S. 164 (1989). See H.R. Rep. No. 102-40(I), 102nd Cong., 1st Sess. 23, 45, 49, 60, 89 (1991).

(2) the decision of the Supreme Court in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) has weakened the scope and effectiveness of federal civil rights protections;

To remedy the perceived consequence of the Court's interpretation of Title VII, Congress in the 1991 Act added to Title VII new subsections 701(l) through (p) and 703(k). H.R. Rep. No. 102-40(I), 102nd Cong., 1st Sess. 32 (1991). Summarizing the effects of the new legislation, the House Report said, "The Committee intends the proof of business necessity to be an affirmative defense as to which the respondent bears the burden of persuasion." Id., at 34.⁴ Congress, then, has acted specifically to overturn part of the Wards Cove decision.⁵

⁴ The House Report was drafted by the Education and Labor Committee and the Judiciary Committee. No Senate Report was submitted with the legislation. H.R. Rep. No. 102-40(I), 102nd Cong., 1st Sess. 1 (1991).

⁵ The Civil Rights Act of 1991 left intact this Court's holding that internal comparative statistics are not probative where the employer hires from the external labor market. The Act also codifies, in §§ 105(a)(k)(1)(A) and (B), this Court's holding that plaintiffs bear the burden of persuasion with respect both to impact and to causation, and codifies,

The question presented by these consolidated cases is whether the Civil Rights Act of 1991 applies to cases pending when the Act was passed. The Senate passed the legislation on October 30, 1991, the House on November 7, 1991, and the President signed the Act into law on November 21, 1991. Statement of President George Bush Upon Signing S.1745, 27 Weekly Comp. Pres. Doc. 768 (Nov. 21, 1991). As of that time, after Wards Cove had been reversed and remanded by this Court and then remanded by the Ninth Circuit, the District Court had (in January 1991) again dismissed all of plaintiffs' claims, and plaintiffs had once again appealed to the Ninth Circuit. Their appeal has been pending for over two years.

Section 402(b) of the Act (codified in a note at 42 U.S.C. § 1981) provides:

Notwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for

in § 105(a)(k)(1)(A)(i), this Court's holding that plaintiffs must prove the disparate impact of a particular practice.

which an initial decision was rendered after October 30, 1983.

Only the Wards Cove Packing Company v. Atonio case fits this exception. The section was added to the Act because it was thought that the companies, which had been found innocent of discrimination under the law existing at the time, should not be required to relitigate a case filed in 1974 and tried in 1982 under legislatively-mandated standards passed in 1991. 137 Cong. Rec. S15953, S15966 (daily ed. Nov. 5, 1991).

In their present appeal, the Wards Cove plaintiffs argue that Section 402(b) is unconstitutional and that new standards of proof adopted by the Civil Rights Act of 1991 retroactively apply to the ongoing Wards Cove litigation. Therefore *amicus curiae* Wards Cove Packing Company, Inc. is interested in the present consolidated cases.

II. SUMMARY OF ARGUMENT

The Wards Cove litigation offers an example of the extreme unfairness and enormous difficulties of the presumption of retroactivity. The case was tried eleven

years ago based on an evidentiary period that is a *generation* old. The losing litigants were active in seeking changes in the law in order to overturn this Court's decision in the case. The case is now on its fourth appeal to the Ninth Circuit and the appellant plaintiffs there argue that the Civil Rights Act of 1991 should be retroactively applied. The result of retroactive application of such new rules — whether they be labeled substantive or procedural — will protract litigation, waste judicial resources, and disturb reasonable expectations as to the finality of litigation. The presumption against retroactivity is the more just rule.

III. ARGUMENT

A. The Effects of Retroactivity Are Particularly Evident and Egregious as Applied to Cases Such as *Wards Cove*.

1. The History of the *Wards Cove* Litigation is as Instructive as it is Torturous.

That conduct should ordinarily be assessed under the law that existed when the conduct took place is a principle that has "timeless and universal human appeal."

Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 855 (1990) (Scalia, J. concurring). An example of what may happen should this principle be subverted is found in the Wards Cove case, a particularly noxious eventuality noted by the District of Columbia Circuit in Gersman v. Group Health Ass'n, Inc., 975 F.2d 886, 890 (D.C. Cir. 1992):

Given the potentially drastic impact of retroactivity of the disparate impact section on the Wards Cove defendants, it is not unthinkable that legislators wished to reassure the employers that they would not face recoveries of back pay plus interest from some time in the early 1970s for conduct committed twenty years or so before passage of the statute.

Briefly reviewing the convoluted history of the Wards Cove litigation is instructive.⁶ In June 1969 plaintiffs Eugene Baclig and Gene Viernes first went to work for Wards Cove. Plaintiff Frank Atonio was first

⁶ As indicated above, Section 402(b) exempts the Wards Cove litigation from application of the Act. However, plaintiffs in Wards Cove now contend that Section 402(b) is unconstitutional and that the Act, therefore, should apply retroactively to the litigation.

employed by the company in June 1972. In October 1973 Atonio and three others filed a complaint against Wards Cove with the EEOC. A conciliation agreement based on the Commissioner's charge was entered between the EEOC and Wards Cove in February 1974. In March 1974 a complaint was filed by Frank Atonio and nine others against Wards Cove, Castle & Cooke (now Dole Food Company, Inc.) and their joint venture, Columbia Wards Fisheries. Wards Cove, *supra*, 490 U.S. at 647.

In February 1975, the District Court dismissed all Title VII claims against Wards Cove on the grounds that plaintiffs improperly identified defendant Wards Cove in the EEOC charges. This order was reversed on an interlocutory appeal immediately before trial in March 1982.⁷

⁷ Atonio v. Wards Cove Packing Co., Inc., 703 F.2d 329 (9th Cir. 1982). Plaintiffs took an earlier interlocutory appeal from the denial of a preliminary injunction in July 1977. The denial of injunction was affirmed by an unreported decision of the Ninth Circuit, No. 77 - 3006, 3007 (July 16, 1980).

In May 1982, after eight years of discovery, an intense twelve-day trial was held in district court at which over 100 witnesses testified. In October 1983, the district court entered judgment for the employers based on 172 findings of fact. The court dismissed all of plaintiffs' "disparate treatment" claims (intentional discrimination) and rejected as unproven most of the disparate impact challenges to the company's practices. With respect to so-called "subjective" employment practices, the court found they were not subject to attack under a disparate impact theory. Wards Cove, *supra*, 490 U.S. at 648.

The judgment for the employers was affirmed in all respects by the Ninth Circuit in August 1985, Atonio v. Wards Cove Packing Co., Inc., 768 F.2d 1120 (9th Cir. 1985), but that decision was vacated in November 1985 when the Court of Appeals agreed to hear one aspect of the case *en banc*. Wards Cove, *supra*, 490 U.S. at 648, citing Atonio v. Wards Cove Packing Co., Inc., 787 F.2d 462 (9th Cir. 1985). The *en banc* hearing was limited to the

question of whether subjective hiring practices should be examined under a disparate impact model. In February 1987, the *en banc* court held that the disparate impact analysis should be applied to such practices, reversing previous decisions of the circuit. The case was reassigned to the original panel. Atonio v. Wards Cove Packing Co., Inc., 810 F.2d 1477 (9th Cir. 1987).

In September 1987, the original panel did an about face on the impact analysis⁸ and held plaintiffs had made out a *prima facie* case of unintentional discrimination in hiring. 827 F.2d 439 (9th Cir. 1987).⁹ Wards Cove

⁸ The dismissal of disparate treatment claims was again affirmed: Atonio v. Wards Cove Packing Co., *supra*, 827 F.2d at 442. A petition for certiorari to review this dismissal was denied. 485 U.S. 989 (1988).

⁹ The practical effect of the Ninth Circuit decision was to overrule existing Ninth Circuit authority and having found a *prima facie* case of disparate impact, to shift the burden of proof to the employer. Plaintiffs had argued the same evidence in support of both their disparate treatment and disparate impact theories. Under the disparate treatment model, the employer need only articulate a non-discriminatory reason to meet its burden of rebuttal (Texas Dept. of Comm. Affairs v. Burdine, 450 U.S. 248 (1981)); however, under the Ninth Circuit's view the change in

sought review of the decision, and the case was argued before this Court in January 1989.

In June of that year, this Court reversed the Ninth Circuit on the well-established ground that statistical disparities between dissimilar classifications caused by an artificial oversupply of minorities in one job department are irrelevant to a proper disparate impact analysis. The Court went on to hold that the plaintiff always has the burden of persuasion, and the defendant may justify a practice causing disparity by showing that the practice was based on a legitimate employer goal. The case was remanded to inquire as to whether plaintiffs had established a *prima facie* disparate impact case on any other basis, besides their discredited statistics. Wards Cove, *supra*, 490 U.S. at 659-661.

decisional law would have shifted the burden of persuasion to the employer using the disparate impact theory on the same evidence. Atonio v. Wards Cove Packing Co., *supra*, 827 F.2d at 439.

In January 1990, after denying plaintiffs' motion for further briefing, the Ninth Circuit Court of Appeals remanded the case to the District Court, which in January 1991 issued a new decision finding no disparate impact and dismissing plaintiffs' case. Plaintiffs again appealed, and in September 1992 the case was reargued before a new three-judge panel of the Ninth Circuit Court of Appeals.¹⁰

The view from 1993 of the Wards Cove litigation is of a case for which the at-issue events occurred more than two decades ago and which was tried eleven

¹⁰ Plaintiffs in their appeal to the Ninth Circuit are contending that the 1991 Act has changed the requirements of proof necessary to establish a *prima facie* case of disparate impact and the proof required to justify the employer's practices. Defendants have argued that plaintiffs have insufficient evidence to establish a *prima facie* case under the new Act. The United States intervened in the case and argued that the Civil Rights Act of 1991 is not retroactive. U.S. Br. in Atonio v. Wards Cove Packing Co., No. 91-35306. The United States has now reversed its position. Infra, n.15.

years ago.¹¹ The employers have spent about \$2 million on the litigation. 137 Cong. Rec. H3932 (daily ed. June 5, 1991). The case has been fully tried, argued on appeal six times, and reargued on remand in the district court. At no point has a court found that Wards Cove Packing Company or Dole Food Company discriminated against its employees.

2. If the Act is Applied Retroactively, A New Trial May be Required in a Case Already Two Decades Old.

The Wards Cove plaintiffs now urge on appeal that the "disparate impact" portions of the new law (Section 105(a)), be retroactively applied. Those provisions (1) allow a complaining party to establish that the elements of an employer's decision-making process are incapable of separate analysis and therefore may be analyzed as a whole, (2) place the burden of persuasion on the employer once a

¹¹ Commenting on the *thirteen*-year-old Title VII case before it, the court in Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1168 (5th Cir. 1978) called the action a "paleolithic museum piece." Using that standard, Wards Cove must be measured in geologic rather than mere anthropologic time.

prima facie disparate impact case is shown and (3) change this Court's standards as to the degree of proof necessary to justify a business practice that causes impact.¹² To get around the clear bar of Section 402(b), plaintiffs argue it is unconstitutional.

To carry the Wards Cove plaintiffs' arguments to their logical extreme would permit not only a new trial, but new discovery to ferret out evidence as to whether the elements of selection process were capable of separate analysis, discovery of evidence now more than

¹² The Ninth Circuit has stated that the 1991 Act merely "return[s] the law to its previous posture." Estate of Reynolds v. Martin, 985 F.2d 470, 475 (9th Cir. 1993). However, it is presumptuous of the circuits to say that Wards Cove was more than a clarification of existing tensions within Griggs v. Duke Power Co., 401 U.S. 424 (1971). See, Supreme Court, Leading Cases, 103 Harvard Law Review 137, 350-361 (1989). It is, of course, not the function of the 1991 Congress to interpret the intent of the 1866 or 1964 Congresses. It is the function of Congress to declare contemporary policy based on politics rather than resolve a dispute between Congress and the Supreme Court. Luddington v. Indiana Bell Telephone Co., 966 F.2d 225, 228 (7th Cir. 1992). And clearly the provision dealing with the challenges to selection practices as a whole (§ 105(a)) is entirely new.

twenty years old. A trial could not easily be recreated eleven years after it occurred and a generation after the case period began. For instance, the employers' principal witness as to the crucial labor market analysis, Dr. Albert Rees, is deceased. *New York Times* (Sept. 8, 1992). Two of the plaintiffs are dead. Many witnesses would be testifying to events that occurred half their lifetimes ago.¹³

3. The Potential of Retroactivity has Spurred Plaintiffs in Wards Cove to Retry Their Case in Congress.

The extent to which the Wards Cove plaintiffs will go to attempt to have Congress retry a case plaintiffs have been unsuccessful with in the courts was made evident during the passage of the Civil Rights Act of 1991. The plaintiffs themselves assiduously lobbied for particular language in and passage of the 1991 Act (and its predecessors) with the assistance of Senator Brock Adams,

¹³ In Mozee v. American Commercial Marine Service Co., 963 F.2d 929, 938 (7th Cir.), *cert. denied*, 113 S. Ct. 207 (1992), the court stated that after fifteen years of litigation even a *remand* under a new statute is unjust.

whose former law firm (Garvey, Schubert, Adams and Barer) had been trial counsel for plaintiffs.¹⁴ After negotiations taking a year and one-half, the leaders of the civil rights community, led by Senator Kennedy, finally reached an agreement with the Administration regarding civil rights legislation. 137 Cong. Rec. S15966 (daily ed. November 5, 1991). Section 402(b), exempting Wards Cove from the new standards of the Act had been a part of the compromise. No amendment was offered to strike that provision, as was the right of any member of Congress. *Id.* at S15966. But when the Senate approved the bill, it

¹⁴ To counter the Atonio plaintiffs' efforts, Wards Cove Packing Co. lobbied Congress for an exemption of the Atonio case from the disparate impact provisions (only) of the Act. The Company's argument was grounded in common sense and simple justice: the evidence (as opposed to media opinion) had twice been examined and showed the Company did not discriminate; in fact, it hired more minority workers than the labor supply would predict. If any case should not have to go through the litigation wringer a third time, it was this one. That seventy-three senators voted for the exemption is testament to the basic fairness that the case be left alone by Congress.

omitted the section due to a mistake by legislative counsel. 137 Cong. Rec. S15953 (daily ed. November 5, 1991).

The bill making a technical correction to restore Section 402(b) to the Act was supported by the Act's prime sponsors, Senators Danforth and Kennedy. *Id.* at S15953. Senator Dole commented, "I must say, if we cannot make technical corrections around this place after somebody has made an agreement, we are never going to get anything done." *Id.* at S15953.

Nevertheless, seeing an opportunity to alter the Wards Cove litigation, Senator Adams rose in the Senate to argue against adoption of the technical resolution, S. Res. 214. His argument was rejected. With bipartisan support, Section 402(b) was restored, with 73 senators supporting the amendment. 137 Cong. Rec. S15967-8 (daily ed. November 5, 1991). But in March 1993, based on the Wards Cove plaintiffs' complaints, Congressman McDermott, a Washington Democrat, introduced the so-called "Justice for Wards Cove Workers Act" to remove

Section 402(b) from the Civil Rights Act of 1991 and undo the compromise reached only five months earlier.

4. Retroactivity Encourages Endless Litigation.

Plaintiffs' arguments regarding retroactivity are, then, an invitation for this Court to allow litigation to ride an infinite loop. A party wins at trial and on appeal. Then the losing party successfully lobbies to change the law, making it retroactive so that it alters the burden of proof or other component aspects of the case. A new trial and subsequent appeals follow. The losing party in this second round successfully lobbies Congress for new retroactive legislation requiring yet another trial and appeal. This scenario is not as farfetched as it first seems, given that the Wards Cove plaintiffs are well on their way to constructing it.

In its *amicus curiae* brief, the NAACP argues that since Congress has "repudiated" this Court's 1986-1991 decisions in the Act, the failure to apply the changes in law retroactively will deny the Act's protections to victims of

discrimination and will postpone the effective date of the legislation from 1991 to 2000. NAACP Brief at 8.

However, under our legal process the fact of discrimination must be established by trial. As the NAACP concedes, civil rights litigation is notoriously long, complex and expensive. Id. at 7-8. Decades of attorneys' time, decades of the parties' time, decades of court time and millions of dollars may be spent in such litigation. Id. at 7. The concepts of due process and separation of powers are more important than the results of a given litigation. Defendant employers have a right to rely on the judicial process to determine claims, effectively and finally, without allowing plaintiffs new opportunities to obtain relief on the same claims with new theories, with changes in the burden of proof or with changes in the standards by which the employers' conduct is to be judged.

B. Language of the Act Does Not Support Petitioners; Section 402(b) Was Inserted on Behalf of Wards Cove As Insurance Against an Uncertain Construction of the Act.

It is argued by petitioners here that because Section 402(b) and Section 109(c)¹⁵ specifically apply prospectively, it suggests Congress intended the balance of the Act to apply retrospectively. Only one Court of Appeals, the Ninth Circuit, has accepted this reasoning. Davis v. City and County of San Francisco, 976 F.2d 1536 (9th Cir. 1992).

The other seven circuits have reached the common sense conclusion based on political reality that the clauses were nothing more than "insurance policies." For example, in Johnson v. Uncle Ben's, Inc., 965 F.2d 1363 (5th Cir.

¹⁵ Section 109(c) provides that "[t]he amendments made by this Section shall not apply with respect to conduct occurring before the date of the enactment of this Act." Pub. L. No. 102-166 § 109(c), 105 Stat. 1071 (1991), 42 U.S.C.A. § 2000e (West Supp. 1992). There seems to have been no floor debate whatsoever on § 109(c). Section 109 specifically overrules EEOC v. Arabian Amer. Oil Co., ___ U.S. ___, 111 S. Ct. 1227, 113 L. Ed. 2d 274 (1991) by providing that Title VII applies to U.S. citizens employed in foreign countries.

1992), the Fifth Circuit Court of Appeals concluded, "Congress may have wanted to ensure that certain retroactive applications of the statute were barred without intending to reach any general conclusion about the statute's general retroactive application." See also, Gersman, supra, 975 F.2d at 890 (where the D. C. Circuit said the two specifically prospective sections might be viewed as "insurance policies" of prospective application, rather than as redundancies); Fray v. Omaha World Herald Co., 960 F.2d 1370 (8th Cir. 1992) (opponents of retroactivity "'hedged their bets'" by specifically making two sections prospective only); Mozee, supra, 963 F.2d at 933; Butts v. City of New York, Dept. of Housing, etc., 990 F.2d 1397 (2d Cir. 1993).

Wards Cove Packing Company argued to Congress that its case had been tried, a decision rendered, and it was fundamentally unfair to allow plaintiffs to retry a case involving conduct which occurred in 1971 based on legal standards first created in 1991. Such retroactivity was akin

to asking employers in 1991 to govern their conduct by standards which Congress might create in 2011.

Until the final compromise version of the 1991 Civil Rights Act was crafted, every version of the bill introduced by proponents of the legislation was retroactive. Wards Cove asked that the bill be amended to include the language which became Section 402(b). Given the nature and content of the continuing appeals by the Wards Cove plaintiffs, when the final legislative compromise was being crafted, Wards Cove asked that Section 402(b) be included as an extra insurance policy in case plaintiffs could persuade a court that the Civil Rights Act of 1991, which was intended to be prospective, was, in fact, retroactive.

These conclusions are borne out by comments in Congress. Representative Hyde stated that Section 402(b) was "unnecessary" and "surplusage" and that it did "not accomplish or achieve a thing and it should not be the subject of so much excitement." 137 Cong. Rec. H9512 (daily ed. Nov. 7, 1991). Similarly, Senator Gorton said,

"The language in question does no more than reaffirm for one specific case the more general mandate of the bill that the civil rights amendments will be applied prospectively." 137 Cong. Rec. S15966 (daily ed. Nov. 5, 1991). Senator Durenberger said that "the general clause that states that the bill is prospective is simply reinforced by this amendment that provides merely one example where the bill is prospective." *Id.* And Senator Murkowski said the section "should not be viewed as creating an implication regarding whether or not this legislation applies retroactively generally." 137 Cong. Rec. S15493 (daily ed. Oct. 30, 1991).¹⁶

¹⁶ Senator Murkowski also noted that a Congressional Act to actually change the result in Wards Cove might violate constitutional separation of powers. 137 Cong. Rec. S15954 (Nov. 5, 1992).

C. The Procedural/Substantive Distinction Suggested by the United States Fails to Cure the Inequities of Retroactivity Because Procedural Changes May Have Substantive Impact.¹⁷

The United States and the EEOC in their brief suggest that the retroactive application of the 1991 Act is justified because it is "procedural" and "remedial." (U.S. Br. 17).¹⁸ They suggest that the Court adopt a procedural/substantive bright line, arguing that it is not manifestly unjust to require a "wrongdoer" to bear costs (albeit

¹⁷ The United States, of course, has retroactively changed its position with the new policies of an Administration which came into office 13 months after passage of the 1991 Act.

¹⁸ Terms such as "remedial", "restorative" and "procedural" may be viewed as euphemisms to obscure the true impact of change. See Orwell, "Politics and the English Language," Collection of Essays, Harcourt & Brace (1950), p. 363: "In our time, political speech and writing are largely the defense of the indefensible." He noted, for example, that imprisonment without trial may be described as "elimination of unreliable elements." Similarly Lou Fuller cautions against the temptation to accept retrospective laws when they merely cure "irregularities of form." He notes a retroactive statute passed by Hitler during the Roehm Purge which converted murders into legal executions. Fuller, The Morality of Law, Yale Press (1969), p. 54.

increased costs) caused by pre-Act conduct. (*Id.* 8). They concede, however that the distinction breaks down when the change in procedures may require a new trial (*Id.* 24, n.14). Implicit in this concession is the realization that even procedural changes may have substantive impact.¹⁹ The circuits have struggled with this issue in a variety of contexts but, with the exception of the Ninth Circuit, have come generally to the same conclusion, namely, that whether labeled procedural or substantive, the changes affect substantive rights.²⁰

¹⁹ "But such changes can have as profound an impact on behavior outside the courtroom as avowedly substantive changes." Luddington, *supra*, 966 F.2d 225, 229. The Court of Appeals in the present case noted that a change in procedural rules should not invalidate procedures followed before the new rule was adopted. Landgraf v. USI Film Products, 968 F.2d 427, 433 (5th Cir. 1992), citing Belser v. St. Paul Fire & Marine Ins. Co., 965 F.2d 5, 9 (5th Cir. 1992) ("[N]ew procedural statutes do not ordinarily invalidate steps already taken under old law," citing Wilson v. General Motors Corp., 888 F.2d 779, 781 (11th Cir. 1989); Belanger v. Great American Indemnity Co., 188 F.2d 196, 198 (5th Cir. 1951)).

²⁰ Not retroactive: Mozee, *supra*, 963 F.2d 937 (case had been tried); Butts, *supra*, 990 F.2d at 1397 (cause of action if any arose pre-Act); Johnson, *supra*, 965 F.2d at

Some sections of the new Act could be called "procedural" e.g. right to jury trial (§ 102); right to compensatory or punitive damages (§ 102); recovery of expert witness fees (§ 113); commencement of statute of limitation (§ 114); prejudgment interest (§ 114). Others are arguably "substantive" e.g. creation of a cause of action for post-hire conduct (§ 101); expansion of right to challenge seniority systems (§ 112); prohibition of race-norming test scores (§ 106). However, *all* sections have substantive impact. For example, the increase in potential liability to include compensatory and punitive damages (§ 102) clearly has substantive impact (§ 102).

1373 (case in litigation 18 years); Landgraf, *supra* (amended damages a sea change in employer liability and a retrial would be a manifest injustice); Rowe v. Sullivan, 967 F.2d 186 (5th Cir. 1992) (a new statute of limitation is arguably substantive); Laynes v. AT&T Technologies, Inc., 976 F.2d 1370 (11th Cir. 1992) (case already tried and litigated two and a half years); Gersman, *supra*, 975 F.2d 886 (pre-Amendment conduct); Huey v. Sullivan, 971 F.2d 1362 (8th Cir. 1992) (prejudgment interest); *but see*, *retroactive*: Estate of Reynolds, *supra*, 985 F.2d at 470 (prejudgment interest); Davis, *supra*, 976 F.2d at 1536 (expert witness fees).

None of the circuits has expressed a preference for a substantive/procedural bright line. That they have analyzed the retroactivity issues somewhat differently suggests that such a distinction is difficult in application.

In the two cases before this Court the circuits have both indicated a preference for prospective application.²¹ The panel in Landgraf, however, did not find it necessary to ground its decision on a general presumption because it found a new trial and substantially increased exposure to damages would be manifestly unjust. 968 F.2d 427, 433.

The Second, Seventh, Eleventh and District of Columbia Circuits have applied the presumption in Bowen v. Georgetown Univ. Hospital, 488 U.S. 204 (1988), to the facts of the cases.²²

²¹ See also Johnson, *supra*, 965 F.2d at 1375; Vogel v. City of Cincinnati, 959 F.2d 597 (6th Cir. 1992).

²² Butts, *supra*, 980 F.2d 1397; Mozee, *supra*, 963 F.2d 929 (7th Cir.); Gersman, 975 F.2d 886; Baynes, *supra*, 976 F.2d 1370.

The Sixth and Eighth Circuits have held the Act as a whole is not retroactive.²³ The Eighth Circuit *en banc* concluded that a case-by-case application of Bradley v. School Board, 416 U.S. 696 (1974), would be unworkable. Hicks v. Brown Group, 982 F.2d 295, 298 (8th Cir. 1992) (*en banc*). The Sixth Circuit held against retroactivity on the ground that as a whole the Act would affect substantive rights. Harvis v. Roadway Exp., 973 F.2d 490, 497 (6th Cir. 1991). Judge Posner in Luddington, although limiting the holding to cases commenced before the Act, reasoned that:

Retroactive application carefully tailored to situations (quite possibly illustrated by this case) in which those reliance interests are minimal would engender enormous satellite litigation and associated uncertainty to fix an indistinct boundary.

²³ Vogel, *supra*, 959 F.2d 594; Harvis, *supra*, 973 F.2d 490; Fray, *supra*, 960 F.2d at 1377; Hicks, *supra*, 982 F.2d at 298.

966 F.2d at 229. Accordingly, this Court should clarify the Bowen/Bradley tension, fix a distinct boundary and adopt the more just rule.

D. The 1991 Act Was Passed as a Compromise After Clearly Retroactive Similar Legislation Had Been Rejected.

Although comments in Congress as to retroactivity may be inconclusive, in this instance, deeds rather than words are telling. The Civil Rights Act of 1990 contained a section explicitly providing for retroactive application of the Act. Civil Rights Act of 1990, Section 15, reported in H. Rep. No. 101-644, Part 1, 101st Congress, 2nd Sess. (1990).²⁴ The President vetoed the bill, and his veto message specifically singled out "unfair retroactivity rules" as a reason for the veto. President's Message to the Senate Returning Without Approval the Civil Rights Act of 1990,

²⁴ For example, Section 15(a)(6) of the Civil Rights Act of 1990 provided that the counterpart to Section 101(2)(b) of the Civil Rights Act of 1991 would apply to all cases pending on or commenced after June 15, 1989, the date of the decision in Patterson, *supra*. See 136 Cong. Rec. S9968 (daily ed. July 18, 1990).

26 Weekly Comp. Pres. Doc. 1632, 1634 (Oct. 22, 1990). The veto could not be overridden. Bipartisan sponsors in the Senate drafted a bill, S.1745, that deleted the 1990 bill's provisions regarding retroactivity. See 137 Cong. Rec. 15503-12 (daily ed. Oct. 30, 1991). The Congress "knew from their 1990 experience that because of the President's veto power, they could not enact a law that purported to legislate retroactivity." Fray, supra, 960 F.2d at 1377 (emphasis by court). The floor debate in both chambers emphasized that it was necessary to pass a bill the President would sign. See, e.g. 137 Cong. Rec. S15344 (daily ed. Oct. 29, 1991) (statement of Senator Kennedy); 137 Cong. Rec. H9515 (daily ed. Nov. 7, 1991) (statement by Speaker of the House Foley).

That deleting the retroactivity rules was a major reason the President signed the 1991 Act, whereas he refused to sign the 1990 Act, was made clear in the President's statement upon signing the 1991 Act, in which he instructed all executive branch officials to follow "as

authoritative interpretive guidance" the memoranda of law inserted into the Congressional Record by Senator Dole which stated, among other things, that the 1991 Act was not retroactive. Statement of President George Bush Upon Signing S.1745, 1991 U.S.C.C.A.N. 768, 769 (Nov. 21, 1991) (adopting memoranda at 137 Cong. Rec. S15472 (daily ed. Oct. 30, 1991) and 137 Cong. Rec. S15953 (daily ed. Nov. 5, 1991)). When Congress omits in a later version of a bill a provision in an earlier bill criticized by the President upon vetoing the earlier bill, the omission in the later bill demonstrates Congress' abandonment of the position taken in the omitted provision. Amalgamated Ass'n. of Street, Elec. Ry. & Motor Coach Employees v. Wisconsin Employment Rel. Bd., 340 U.S. 383, 392, n.15 (1951).

Congress clearly knew the words to use if it intended to make the statute retroactive. Omitting the retroactivity provisions in the 1991 version of the Act was part of the compromise that allowed the Act to gain bipartisan support

and prompted the President to sign the bill into law. This history of the Act is unambiguous: a bill requiring retroactivity that failed to become law was followed a year later by a bill omitting the requirement of retroactivity. The intent of the legislature was clearly that the Civil Rights Act of 1991 apply prospectively only.

The Ninth Circuit is the only appeals court to find the Act retroactive. In Davis, supra, 976 F.2d at 1536, the Court said Section 109(c) and Section 402(b) comprised strong evidence of legislative intent that the Act was to apply retroactively in all circumstances. The Court noted that prospective application of the Act would render the two sections superfluous. The Court also said that because Congress explicitly intended to reverse several Supreme Court decisions where Congress thought the Court construed several statutes too narrowly, it was likely "Congress intended the courts to apply its new legislation, rather than the Court decisions which predated the Act, for the benefit of the victims of discrimination still before

them." Id. at 1552. But in neither Davis nor Estate of Reynolds, supra, 985 F.2d at 470 did the Ninth Circuit decide that plaintiffs were victims of discrimination because of new law. In both cases that determination was already made on the basis of prior law. Davis added expert witness fees and Estate of Reynolds added pre- and post-judgment interest to awards already made under prior law. Thus the language of both decisions is broader than the issues posed. None of the circuits has adopted a rule which would overturn a ruling on liability.

E. The Presumption Against Retroactivity is the More Established and the More Just Doctrine.

"The bias against retroactive laws is an ancient one." Smead, The Rule Against Retroactive Legislation, a Basic Principle of Jurisprudence, 20 Minn. L. Rev. 775 (1936). Justice Scalia noted in his concurring opinion in Kaiser Aluminum, supra at 855, that the presumption of prospective application is rooted in history and tradition. Noting that the principle was recognized by the Greeks, the

Romans, by English common law, and by the Code of Napoleon, he said "It has long been a solid foundation of American law." Kaiser Aluminum, *id.* He quoted Justice Story:

[R]etropective laws are . . . generally unjust; and . . . neither accord with sound legislation nor with the fundamental principles of the social compact.

Id. (quoting J. Story, Commentaries on the Constitution § 1398 (1851)).²⁵ In United States v. Security Industrial

²⁵ An extensive list of early cases where the Supreme Court said laws are presumed to act prospectively is found in Smead, *supra*, at 781 n.22. The author summarized:

American commentators and courts also viewed [the principle] as based on the same concepts of justice and jurisprudence of which the English common law held it to be an expression. Retroactive laws were held to be oppressive and unjust, and it was maintained that the essence of a law was that it be a rule for the future. The United States Supreme Court has stated expressly that retrospective legislation would not be favored, that such laws were contrary to American jurisprudence, and that the court, in the absence of an express command or "necessary implication" to the contrary will preserve that a law is designed to act prospectively. [Footnotes omitted.]

Bank, 459 U.S. 70, 79 (1982) decided after Bradley, the court quoted from United States Fidelity & Guaranty v. United States ex rel. Struthers Wells Co., 209 U.S. 306, 314 (1908): "'The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other.'" ²⁶ Justice Scalia, concurring in Kaiser Aluminum, *supra* at 855, also indicated that the presumption of prospective application was based on notions of fairness in that parties to a suit should only be held accountable for the laws at the time of their conduct. As the Court of Appeals for the Second Circuit said in Butts, *supra*, 990 F.2d at 1409, "While the Ex Post Facto Clause of Article I, Section 9 of the United States Constitution applies only to criminal statutes, the fundamental principal animating that clause, that persons be given an opportunity to conform their

²⁶ See also authority collected in Bowen, *supra*, 488 U.S. at 208.

conduct to the law before incurring its sanctions, is equally applicable to civil cases."²⁷

In addition, there are compelling reasons to give parties a reasonable expectation of the finality of litigation. Every trial lawyer should expect to play by the rules — procedural or substantive — in effect at the time of trial. The cost and risk of litigation should not be subject to the subsequent political process.

IV. CONCLUSION

A lofty ambition of the law is to settle expectations. To make plain the relations of our citizens is the very purpose of the legislative and judicial processes. A house is not built on shifting sands, and neither should the hopes of

²⁷ Retroactive application of legislation to a particular case also raises separation of powers and due process concerns. Rights vest in a judgment. The power of a legislature to disturb by subsequent legislation the substantive rights vested by the judgment is constitutionally restricted. McCullough v. Virginia, 172 U.S. 102, 123-124 (1898); Hodges v. Snyder, 261 U.S. 600, 603 (1923). Further, the right to decide cases free from domination by other branches of government is inherent in judicial power. Northern Pipeline Const. Co. v. Marathon Pipe Co., 458 U.S. 50, 58 (1982).

those who seek redress in the courts. By arguing that the Civil Rights Act of 1991 applies to cases pending when the Act was enacted, petitioners seek to judge events long passed by the standards of those currently best able to manipulate the legislative process. This Court should reject their arguments and hold that the Act does not apply to cases pending when the legislation was passed.

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